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Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms

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ABSTRACT

Consumer advocates and policymakers call for abolition of predispute arbitration clauses in consumer contracts, while proponents of arbitration claim such abolition would increase companies' dispute resolution costs, leading to higher prices and interest rates. Policymakers on both sides of the debate, however, rarely consider the empirical research necessary for crafting informed arbitration disclosure rules. This article therefore focuses on how varied research, including my own empirical studies, may inform policies regarding arbitration disclosure regulations. The article also offers suggestions for regulations tailored to have the most impact for the cost in light of this research.

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I. INTRODUCTION

Companies increasingly include arbitration clauses among the "modular" terms cobbled into boilerplate contracts.[1] Consumers already skeptical of the market assume such boilerplate is nonnegotiable and skewed toward the companies' interests.[2] Commentators and policymakers worry that pre-dispute arbitration clauses rob consumers of their judicial recourse rights without knowing consent and unfairly advantage corporate "repeat players" who routinely include arbitration clauses in their form consumer contracts.[3] These critics add that companies use these clauses to curb consumer remedies, bar class actions, and shield the public from information regarding safety, disclosure, and other statutory violations.[4] Some also argue that this essentially allows companies to create private law.[5]

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1. *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1240 (2006) (highlighting how "'boilerplate' has itself taken on a cultural meaning" that translates into a signal that such form terms are not negotiable, especially with respect to arbitration clauses).

2. *Id.* at 1241 (discussing sociological impacts of form contracts).

3. *See* Jean R. Sternlight, *Consumer Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 127, 129-40 (2006) (highlighting American law's enforcement of mandatory consumer arbitration under pre-dispute form contracts).

4. *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212-13 (2007) (discussing privacy in arbitration).

5. *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 704, 704-712, 754 (1999) (discussing how "arbitration privatizes the creation of law"); *see also* Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON

Nonetheless, courts in the United States usually enforce these clauses under the Federal Arbitration Act ("FAA")[6] and efficiency-focused contract law.[7] Proponents of this regime highlight how arbitration clauses can be "fair" and foster satisfying proceedings for companies and individuals. In addition, some arbitration-administering institutions have taken steps toward protecting procedural fairness for consumers and employees who often lack the resources of their corporate opponents. Some therefore claim that arbitration critics overreact to tales of unfairness in seeking to enact broad legislative bans on arbitration clauses.

Still, strong arguments remain for regulating consumer arbitration. I have been among those who have critiqued harsh consumer arbitration provisions, and I have proposed that the existing dispute resolution template of the Magnuson Moss Warranty Federal Trade Commission Improvement Act ("MMWA")[8] should incorporate consumer arbitration reforms to protect consumers' access to warranty remedies and clarify how MMWA claims may be arbitrated fairly.[9] I also have urged policymakers to transform the "shoulds" of the 1998 Consumer Due Process Protocol, proposed by the American Arbitration Association and others through the National Consumer Disputes Advisory Committee, into legislative "musts" that would survive FAA preemption.[10] The Protocol suggests procedural fairness "shoulds" including: clear notice of arbitration clauses and how to obtain information regarding the arbitration process, preservation of consumers'

DISP. RESOL. 291, 313-15, 371 (2005) (discussing how manufacturers' use of form arbitration agreements has privatized dispute resolution in the mobile home industry).

6. Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (2006) (covering domestic arbitration), §§ 201-208 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")), §§ 301-307 (implementing the Inter-American Convention on International Commercial Arbitration ("Panama Convention")). *See also* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2001) (emphasizing the "liberal federal policy favoring arbitration agreements").

7. Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 812-13 (2004) (highlighting restrained application of unconscionability in the wake of rising formalism).

8. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301-12 (2006)).

9. Amy J. Schmitz, *Curing Consumers' Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627-32, 661-86 (2008) [hereinafter Schmitz, *Warranty Woes*] (discussing need for procedural protections in consumer arbitration proceedings); Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 37–55 (2007) [hereinafter Schmitz, *Deference*] (advancing procedural regulation of arbitration in lieu of precluding arbitration).

10. National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, http://www.adr.org/sp.asp?id=22019 (last visited Feb. 12, 2010).

access to small claims court, and measures ensuring "reasonable cost to consumers" and "reasonably convenient" hearing locations.[11]

The potential value of precluding or regulating arbitration clauses is nonetheless unclear. This is largely due to the lack of empirical data regarding consumer arbitration clauses and consumers' related contracting behavior.[12] Furthermore, policymakers propose policies in the dark by failing to consider existing empirical data that is critical to crafting effective and efficient arbitration reforms.[13] Even the limited research available suggests that a broad ban on predispute arbitration agreements is unwarranted. There is evidence that many companies do not use or abuse arbitration clauses in their consumer contracts and that consumers often prevail in arbitration proceedings.[14] Nonetheless, narrower regulation may be warranted to address some companies' use of onerous arbitration clauses to limit remedies and preclude class proceedings to consumers' disadvantage.[15]

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11. *Id.*

12. *See* Shmuel I. Becher & Esther Unger-Aviram, Myth and Reality in Consumer Contracting Behavior (Aug. 4, 2009) (unpublished manuscript, *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443908) (highlighting lack of empirical data and policymakers' consideration of that data in designing contract reforms, relying instead on theoretical assumptions). This is subject to the tandem need for more research regarding the cognitive processes that underlie individuals' "fairness" judgments. Maureen L. Ambrose & Carol T. Kulik, *How Do I Know That's Fair? A Categorization Approach to Fairness Judgments*, *in* RESEARCH IN SOCIAL ISSUES IN MANAGEMENT: THEORETICAL AND CULTURAL PERSPECTIVES ON ORGANIZATIONAL JUSTICE 35, 37-43 (S.W. Gilliland et al. eds., 2001). *But see* Christopher R. Drahozal, *Contracting Out of the Uniform Commercial Code: Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 200-201 (2006) (correctly noting that survey responses regarding why people behave as they do "must be taken with a grain of salt").

13. *See* Joseph P. Mulholland, Behavioral Economics and the Federal Trade Commission 12-15 (Dec. 12, 2007) (unpublished manuscript, *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091745) (discussing the FTC's failure to fully consider empirical research in crafting policies and evaluating the effectiveness of consumer remedies).

14. *See infra* Part III.C (discussing studies indicating fair use of arbitration and benefits of arbitration for consumers).

15. *See* 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, 879-93 (2008) [hereinafter Eisenberg et al., *Summer Soldiers*]; Theodore Eisenberg et al., *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 118-23 (2008) [hereinafter Eisenberg et al., *Mandatory Arbitration*] (discussing the same study, noting conflicting research, and finding in this study of 21 large companies' contracts that companies' targeted use of arbitration clauses in only their consumer contracts indicated motivation to avoid aggregate proceedings and perhaps all liability).

A more measured approach may be to regulate the content of clauses and procedures applicable to consumer arbitration.[16] Although there are a variety of options for such regulation, this article will focus on one initial step: requiring special notice and disclosure provisions for pre-dispute arbitration clauses in consumer contracts.[17] I have been among those calling for heightened disclosure regulations, which garner support from voluntary consent notions underlying promise enforcement theory.[18] Emphasis on disclosure is reflected in the 2008 Farm Bill, which permits a producer or grower to opt out of arbitration before entering a contract and requires "conspicuous disclosure" of this opt-out right.[19] Some courts also have interpreted fiduciary duties to require heightened disclosure and explanation of arbitration terms even where those terms appear in the same contract that created the fiduciary relationship.[20]

Although arbitration notice or disclosure regulations are not overly intrusive, they should not be adopted without due regard for how they may increase company costs. In addition, it would be imprudent to interfere with contractual freedom for no reason, and arbitration disclosures would not be worth their costs if consumers ignore them regardless of how conspicuously companies state them in their contracts. At the same time, disclosure regulations may have more meaning and impact if they go beyond conspicuous notice to include affirmative duties to educate consumers regarding the arbitration process and its potential impacts on their rights. That said, it is unclear that consumers will take the time to read, listen to, or care

16. *See* Schmitz, *Warranty Woes*, *supra* note 9, at 661-86 (discussing a variety of procedural regulations).

17. *See* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts* 4-5 (N.Y. Univ. Law & Econ. Working Paper No. 91, 2007), *available at* http://lsr.nellco.org/nyu_lewp/91/ (noting that many support disclosure regulations of some type, but differ with respect to extent and content of those regulations).

18. *See* Schmitz, *Warranty Woes*, *supra* note 9, at 661-64 (describing my and other proposals for such disclosures).

19. Food, Conservation, and Energy Act of 2008 ("Farm Bill"), Pub. L. 110-246, § 210, 122 Stat. 1651 (June 18, 2008) (codified at 7 U.S.C.A. § 197c (West 2010)). The Farm Bill added a new section on the use of arbitration agreements to Title II of the Packers and Stockyards Act, 7 U.S.C. §§ 181-231 (2006) (also providing the grower a right to opt into arbitration after a dispute arises if both parties agree in writing).

20. *See* Daly v. U.S. Bancorp Piper Jaffray, Inc., No. 04-490, 2005 WL 590076, at *1 (Mont. Mar. 15, 2005) (unpublished table decision) (holding that a pre-dispute arbitration clause in a client/broker account agreement was unenforceable even if the client would have separately signed the arbitration clause because this same account agreement gave rise to the broker's fiduciary duty to fully explain the arbitration clause in that agreement).

about information pertaining to resolution of future claims they do not foresee at the time of the transaction.

Design and implementation of arbitration disclosure regulations therefore depend on deep and nuanced empirical research, not simply doctrinal or theoretical assumptions.[21] This article therefore highlights this need by discussing the existing empirical data, including my own, and suggests how this data may be used to tailor regulations that will have the most impact for the costs. It also calls for further research to test these ideas and generate more enlightened arbitration reforms.

Part II sets the stage with discussion of the law, theory, and policy guiding current enforcement and critiques of arbitration clauses in consumer contracts. Part III describes the empirical research that has focused on either comparing contract terms or arbitration outcomes and satisfaction. However, this research has not explored consumer contracting with respect to arbitration clauses. Part IV therefore discusses my research exploring this area. This includes my findings from consumer focus groups, a collection of arbitration clauses in wireless phone service and credit card contracts, and responses to a survey administered over the Internet that relate to whether consumers read, understand, or even care about arbitration clauses. Part V offers suggestions for arbitration disclosure regulations in light of this and others' research. The article concludes with a call for more deep and varied research aimed to guide arbitration policy design.

II. Synopsis of Consumer Arbitration Law, Theory, and Policy

A. *Arbitration Law*

International and domestic arbitration laws generally require enforcement of valid agreements to arbitrate and their incorporation of rules such as those promulgated by the American Arbitration Association ("AAA"), the International Chamber of Commerce ("ICC"), or the National Association of Securities Dealers ("NASD").[22] This relegates enforcement analysis to contract formation and validity issues, which courts have mainly approached in a formalistic and efficiency-

21. This article does not rehash well-covered policy arguments regarding the enforcement of consumer arbitration generally, or all possible regulations of arbitration contracts and procedures. Instead, it focuses on consumer arbitration notice reforms and the need for empirical research to craft informed policy.

22. Richard E. Speidel, *Common Legal Issues in American Arbitration Law*, *in* Arbitration Law in America: A Critical Assessment 29, 31-34 (2006).

focused manner.[23] Proponents of arbitration argue that enforcement results in cost and time savings, while critics complain that it impairs consumer remedies and essentially allows companies to privatize law and avoid regulation through their arbitration programs.[24]

1. *Broad Arbitration Statutes*

On the international level, the widely-adopted New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards generally mandates summary enforcement of arbitration agreements and awards.[25] The United States has implemented this Convention through Chapter Two of the FAA,[26] which U.S. courts have applied with a pro-enforcement glaze aimed to promote both arbitration and international comity.[27] This glaze has also led courts to narrowly read the Convention's allowance for public policy review of arbitration awards to protect the discretion of arbitrators, and to curtail judicial power to mandate particular arbitration procedures or contract formation standards.

Courts have similarly enforced domestic arbitration agreements under the FAA Chapter One[28] and its state counterpart, the Uniform

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23. *See* Schmitz, *Warranty Woes*, *supra* note 9, at 635-36 (discussing preemption and its impact on arbitration challenges).

24. *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) (critiquing companies' inclusion of arbitration clauses in consumer and employment contracts); Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV. 327 (1996) (discussing the mandatory nature of arbitration under NASD or NYSE rules in broker-dealer securities contracts).

25. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 67 (3d ed. 1999); THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, Articles 1-16 (1958), *reprinted in id.* at 491-94 (including Appendix) [*hereinafter* NY CONVENTION]; United Nations Comm'n on Int'l Trade Law ("UNCITRAL"), Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 26, 2010) (noting 144 countries had adopted the Convention).

26. FAA, 9 U.S.C. §§ 201-208 (2006) (implementing the New York Convention), §§ 301-307 (implementing the Panama Convention).

27. Kenneth F. Dunham, *International Arbitration is Not Your Father's Oldsmobile Convention*, 2 J. DISP. RESOL. 323, 326-27 (2005) (discussing the development of international commercial arbitration and noting the importance of the New York Convention in that development); *id.* at 330-31 (discussing importance of contract terms and rules incorporated therein in dictating the arbitration procedures); NY CONVENTION, *supra* note 25, at Arts. 1-16.

28. FAA, 9 U.S.C. §§ 1-16 (2006).

Arbitration Act ("UAA").[29] These laws require courts to specifically enforce domestic arbitration agreements, and they augment this mandate with provisions for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.[30] Furthermore, the Supreme Court's holding that the FAA preempts states from singling out arbitration for special treatment or otherwise hindering the enforcement of arbitration in contracts affecting interstate commerce leaves states with little power to regulate consumer arbitration provisions beyond application of general contract defenses.[31]

Drafters of form consumer contracts therefore have great power in dictating arbitration provisions and procedures.[32] They may provide for ad hoc arbitration they administer themselves, or they may incorporate some or all of the procedural rules promulgated by administering institutions such as the AAA, ICC, or NASD.[33] The institutions' rules generally cover hearing location, arbitrator appointment, discovery, fees and costs, and other such basics, and they may provide for special procedures in consumer cases.[34] For example, the AAA's Commercial Arbitration Rules require parties to

29. Uniform Arbitration Act ("UAA"), 7 U.L.A. § 1 (1997). The UAA is model legislation that nearly all states have adopted to require the same basic enforcement for local arbitration agreements and awards beyond the purview of the FAA. *Id.*

30. *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124–35 (2002) (discussing the FAA's pro-efficiency remedial provisions).

31. *See* Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681 (1996) (finding the FAA preempted state notice requirements for arbitration clauses); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration); Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that the FAA applies in federal and state court).

32. *See* Steven J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88, 88-126 (2006) (also proposing reforms aimed at solidifying the contractual approach).

33. *See* Dunham, *supra* note 27, at 330-40 (discussing the arbitration rules of the AAA, ICC, and others).

34. *See, e.g.*, AM. ARBITRATION ASS'N ("AAA") COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2007), *available at* http://www.adr.org/sp.asp?id=22440; AAA SUPP. PROCEDURES FOR CONSUMER-RELATED DISPUTES (2005), *available at* http://www.adr.org/sp.asp?id=22014.

split potentially high hearing costs, while AAA's Supplementary Procedures for Consumer-Related Disputes cap consumers' costs at different levels depending on the amount of their claims.[35]

2. *Applicable Contract Law*

Contract defenses are the primary means for arbitration regulation in the wake of U.S. Supreme Court rulings rejecting arguments that form arbitration clauses overly burden statutory rights.[36] Courts now enforce arbitration of statutory claims covering discrimination, consumer lending, consumer warranties, and securities.[37] This generally has included consumer protection claims under the MMWA, even when arbitration clauses require consumers to pay procedure costs that could equal or exceed the amounts of their claims.[38] Furthermore, courts have agreed that arbitration of statutory claims does not constitute state action subject to due process requirements of the U.S. Constitution.[39]

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35. *Compare* AAA COMMERCIAL ARBITRATION AND MEDIATION PROCEDURES R-49 to R-51 (2007), *available at* http://www.adr.org/sp.asp?id=22440, *with* AAA SUPP. PROCEDURES FOR CONSUMER-RELATED DISPUTES C-8 (2005), *available at* http://www.adr.org/sp.asp?id=22014.

36. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (finding statutory age discrimination statute could be subject to arbitration); EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 748-55 (9th Cir. 2003) (en banc) (finding that Title VII did not preclude enforcement of an arbitration clause in an employment contract); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108-1110 (9th Cir. 2002) (holding that the clause at issue was not unconscionable because the employee could opt out of the arbitration program).

37. *See id. See also Randolph*, 531 U.S. at 91 (finding Truth in Lending Act ("TILA") claims under a consumer financing agreement may be subject to binding arbitration under the FAA); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989) (overruling prior opinion to hold securities claims arbitrable); Schmitz, *supra* note 5, at 326-34 (discussing courts' general allowance for arbitration of MMWA rights).

38. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1147-50 (7th Cir. 1997) (enforcing arbitration clause although the ICC rules incorporated therein curtailed the Hills' access to needed discovery and required them to pay roughly $4,000 in initial costs to pursue their warranty claims on a $4,000 computer). *But see* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of same clause). The Supreme Court has left open a small window for case-specific arguments that high filing costs may be invalid where they will prevent an impoverished individual from vindicating her statutory rights. *See Randolph*, 531 U.S. at 91 (holding TILA claims arbitrable despite possibly high arbitration costs but leaving open the possibility for such claims where one sufficiently proves inability to cover the costs); Bailey v. Ameriquest Mortgage Co., 346 F.3d 821, 823-24 (8th Cir. 2003) (finding cost challenges must be submitted to the arbitrator under the parties' agreement).

39. *See* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714-23, 1745-1762 (2006)

Even if consumers successfully argue that an arbitration agreement's preclusion of rights such as class relief, recovery of punitive damages, or recovery of attorney fees prevents them from asserting their statutory rights, they often must still arbitrate their tort and contract claims.[40] In addition, courts may informally push parties toward arbitrating cases requiring potentially high administration fees by signaling that they will enforce the arbitration clause if the corporation agrees to pay arbitration filing fees.[41] Courts also may order consumers to arbitrate warranty claims against some, but not all, of the parties who may bear responsibility for the claims.[42]

This leaves consumer challenges of arbitration clauses to contract defenses, such as lack of consideration, fraud, and unconscionability.[43] Furthermore, courts following the Supreme Court's "separability" mandate will only consider these challenges when they are aimed at the arbitration clause itself, and not the underlying contract as a whole.[44] At the same time, these arbitration clause challenges are often unsuccessful. Lack of consideration challenges, for example, usually fail because it is sufficient if an arbitration provision is mutual, is among an exchange of various contract promises, or is added pursuant to an initial contract allowing for additions.[45]

(noting U.S. courts' conclusion that private arbitration does not involve state action, but critiquing this conclusion with respect to arbitral class actions).

40. Browne v. Kline Tysons Imports, Inc., 190 F. Supp. 2d 827, 828-33 (E.D. Va. 2002) (allowing litigation of MMWA claims, but ordering arbitration of TILA and state statutory and common law claims arising out of car sale).

41. *See, e.g.*, Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 847-48 (N.D. Ill. 2001) (finding that an individual plaintiff could not be compelled to arbitrate if required to bear the prohibitive arbitration costs but stating that the court would reconsider its ruling if the defendants agreed to pay these costs).

42. *Compare Ex parte* Gates, 675 So. 2d 371, 374-75 (Ala. 1996) (enforcing arbitration against a consumer on behalf of non-signatory manufacturer based on broad arbitration clause) *with Ex parte* Jones, 686 So. 2d 1166, 1166-68 (Ala. 1996) (concluding there was no agreement to arbitrate between consumers and the non-signatory to the arbitration agreement).

43. *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 695-97 (describing courts' enforcement of arbitration clauses generally).

44. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (finding courts may only consider attacks on an arbitration clause and not those aimed at a underlying contract); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-49 (2006) (clarifying that this separability rule is a matter of federal law and that an arbitrator must decide claims that the contract was illegal).

45. *See* Hawkins v. Aid Assoc. for Lutherans, 338 F.3d 801, 808 (7th Cir. 2003) (finding initial contract terms allowing for later changes provided consideration for later-added arbitration clause). *See also* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1382-86 (1996) (critiquing the courts' failure to require "meaningful consent").

Fraud and misrepresentation claims similarly fail due to the heavy burden of proving that the consumer accepted the arbitration clause due to a knowing or recklessly-made false material representation about arbitration.[46] In addition, assent challenges face high hurdles because most courts agree that consumers are responsible for reading their contracts and there is no duty to inform consumers explicitly about arbitration provisions.[47]

Some courts have nonetheless been more receptive to consumers' challenges of arbitration agreements based on unconscionability.[48] Some have found pre-printed form provisions offered without negotiation unconscionable when they include suspect terms such as "carve-outs" that give the drafter an option to litigate, cost and fee allocations that overly burden one party, extremely inconvenient location selections, and remedy limitations that gut statutory claims.[49] In one case, for example, the court struck a clause in an arbitration provision in a consumer sales contract as unconscionable because it gave the seller sole power to choose the arbitrator.[50] The court nonetheless affirmed the trial court's order to arbitrate with a court-appointed arbitrator.[51]

In addition, some courts have refused to enforce class relief waivers embedded in consumer arbitration clauses. In *Fiser v. Dell Computer Corp.*,[52] the Supreme Court of New Mexico refused to enforce an arbitration clause in Dell's computer purchase contracts because the class action ban was substantively unconscionable and against state policy.[53] The court found that the consumers' small dollar

46. *In re* Firstmerit Bank, N.A., 52 S.W.3d 749, 756-58 (Tex. 2001) (in which consumers challenged arbitration based on fraud, along with unconscionability, duress, and revocation).

47. *See* Torrance v. Aames Funding Corp., 242 F. Supp. 2d 862, 869-70 (D. Or. 2002) (emphasizing no duty to disclose or explain arm's length written agreements); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 619-23 (2000) (discussing the court's strict enforcement of form contracts in precluding fraud challenges of contracts containing disclaimer clauses).

48. *See* Stempel, *supra* note 7, at 812-13.

49. *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 113-14 (2002) (listing suspect terms and citing cases supporting and denying these claims).

50. Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So. 2d 779, 780-81 (Ala. 2002) (citing the provision and finding the transaction also was adhesive).

51. *Id.* at 785.

52. Fiser v. Dell Computer Corp., 188 P.3d 1215 (N.M. 2008).

53. *Id.* at 1217-22.

claims would not be worth pursuing in individual arbitration proceedings, and therefore the consumers needed to join their claims in a class action to effectively vindicate their rights.[54] Quoting from another opinion, the court emphasized that without a class action, "only a lunatic or a fanatic sues for [ten to twenty dollars.]"[55] The court used this same reasoning to deny enforcement of the contract's choice of law clause designating Texas law, which allows class action waivers; it held that the FAA did not preempt the court's application of the unconscionability contract defense.[56]

Such applications of unconscionability to arbitration clauses risk FAA preemption if they frustrate enforcement of these clauses in contracts affecting interstate commerce. Furthermore, many courts apply the unconscionability doctrine in pro-arbitration and efficiency-focused fashions and consequently reject unconscionability claims, as well as other contract challenges of arbitration clauses.[57] The court in *Adler v. Dell, Inc.*, for instance, found the Dell arbitration clause barring class relief enforceable under Texas and Michigan law.[58] The court noted Dell's assertion that its arbitration provision promotes affordable prices for its products and rejected the consumers' claims that the costs of individual arbitration proceedings would effectively

54. *Id.* at 1218-22 (refusing to follow Texas law allowing for class action waivers despite a Texas choice of law clause because of New Mexico's fundamental policy of ensuring a viable mechanism for consumers to assert their rights).

55. *Id.* at 1220 (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) and adding language in brackets to the original quote). *See also* Genevieve Saumier, *Consumer Dispute Resolution: The Evolving Canadian Landscape*, 1 CLASS ACTION DEFENCE Q. 52 (2007), *available at* http://ssrn.com/abstract=1291960 (noting that U.S. states "continue to be thwarted in their attempts to protect consumers' access to courts and class actions" due to the FAA, whereas Canadian provinces have been able to preserve such access through legislation denying effect of arbitration clauses in consumer contracts).

56. *Fiser*, 188 P.3d at 1222. This reasoning is somewhat suspect. The court admits that the contract was not adhesive and simply states substantive unconscionability as a conclusion after an exhaustive analysis based on "fundamental New Mexico policy." *Id.* at 1221-22. Furthermore, the court used this policy to disregard the Texas choice of law provision in the contracts. *Id.* at 1218-21.

57. *See, e.g.*, Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002) (denying an unconscionability challenge to an arbitration agreement); Johnnie's Homes, Inc. v. Holt, 790 So. 2d 956, 963-65 (Ala. 2003) (enforcing a consumer's duty to arbitrate warranty, fraud, breach, and other claims); Green Tree Fin. Corp. v. Lewis, 813 So. 2d 820 (Ala. 2001) (denying an unconscionability challenge to an arbitration clause by an illiterate consumer).

58. Adler v. Dell, Inc., No. 08-CV-13170, 2008 WL 5351042, at *1-13 (E.D. Mich. Dec. 18, 2008) (noting that applying Texas law under the choice of law clause allowed for enforcement of the class action waiver "[e]ven if Michigan could be said to have a 'fundamental interest' in prohibiting contractual class action waiver provisions").

preclude their vindication of small claims.[59] The court also emphasized that consumers bear the burden of reading and comparing sellers' contract terms and should shop elsewhere if they do not want to abide by Dell's arbitration provision.[60]

Many courts have enforced consumer arbitration clauses assuming companies pass cost savings from arbitration programs on to consumers through lower prices and higher quality.[61] Such assumptions pervade opinions like *Hill v. Gateway 2000, Inc.*, in which the court enforced an arbitration provision in terms that came with a computer consumers had purchased over the phone.[62] In finding that the consumers assented to arbitration by failing to return the computer within thirty days, the *Hill* court fostered a judicial sentiment that form contracts promote efficiency regardless of whether consumers take the time to read or negotiate them.[63] The court also failed to find the arbitration provision unconscionable, even though the contract created potentially high proceeding costs and curtailed class action relief on MMWA claims.[64]

Consumers therefore face an uncertain and limited likelihood of success in challenging arbitration clauses in the courts. Contract defenses remain the most viable means for challenging arbitration clauses, but courts often apply these defenses in formalistic and efficiency-focused fashions to deny consumers' arbitration challenges. Meanwhile, other courts apply defenses in uncertain or seemingly

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59. *Id.* at *6-8 (also rejecting claims that NAF arbitration proceedings are inherently unfair toward consumers).

60. *Id.* at *9-10 (rejecting Adler's claims that it was unreasonable to expect him to read and compare contracts). The court left open the possibility that a different standard may apply to an "unsophisticated consumer" by distinguishing Adler based on the fact he was an attorney. It also distinguished this case from others in which the contract terms were not provided to consumers prior to completing purchases. *Id.*

61. *See Hill*, 105 F.3d at 1147-50 (finding customer assent to a form arbitration clause). *See also* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435-51, 485-87 (2002) (explaining why electronic contracts are not adhesion contracts and discussing the efficiency benefits of standard form contracts).

62. *See Hill*, 105 F.3d at 1147-50 (enforcing form computer purchase contract requiring arbitration under ICC rules). *But see* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572-76 (App. Div. 1998) (enforcing the identical Gateway arbitration clause, but vacating the portion of the clause requiring arbitration before the ICC due to the "excessive cost factor that is necessarily entailed in arbitrating before the ICC").

63. *Hill*, 105 F.3d at 1149 (stating that "approve-or-return" provisions such as that in *Hill* make consumers better off "as a group").

64. *Id.* More uncertainty has been fueled by indication that antitrust claims of collusively imposing arbitration clauses on consumers may have some viability. *See* Ross v. Bank of America, N.A., 524 F.3d 217 (2d Cir. 2008).

anti-arbitration ways that are vulnerable to FAA preemption challenges. The sum of litigation and unclear law breeds judicial inefficiency and consumer skepticism toward arbitration and highlights some companies' onerous clauses. It also harms companies' ability to rely on arbitration for cost savings that they may pass on through lower prices and higher quality products and services.

B. *Theory and Policy Background*

At the time of initial contracting, parties generally focus on key terms such as price, timing, and performance standards. They usually pay little attention to arbitration or other dispute resolution provisions unless they are especially cognizant or concerned with eventual problems or disputes.[65] Economic theory suggests that this is usually efficient and cost-effective because it saves the contracting parties from wasting resources wrangling over details of future sanctions and dispute resolution proceedings they hope never to use.[66] Rational Design theory similarly posits that parties are more likely to include arbitration or tailored dispute resolution procedures drawing on external delegation in agreements involving complex or costly issues.[67]

At the same time, some economic theorists presuppose a rational actor who has the opportunity to read and consider form contract terms and conduct a cost/benefit analysis.[68] They therefore conclude that courts should not hinder form contracts' efficiency by devoting time or other resources to questioning whether the adhering parties truly assented to form terms.[69] Formalist courts and commentators

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65. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-56, 60-62 (1963) (finding in his early-1960s study of business relations that parties usually focus on "description, contingencies, defective performances and legal sanction").

66. *See* Tarek F. Abdalla, *Litigation vs. Arbitration: Which Is Better for the Commercial Dispute?*, PRAC. LITIGATOR, Sept. 2005, at 47, 51, 52 (discussing logic of basic arbitration clauses). *See also* Macaulay, *supra* note 65, at 58-60 (explaining why standardized contracts without a lot of "red tape" are often cost-effective and practical in business exchanges).

67. Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189 (2007) (testing Rational Design theory in analyzing the frequency of dispute resolution provisions in international agreements).

68. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 233-35, 255-56, 262-63 (2002) (emphasizing courts' failure to redress oppressive or unreasonable consumer contracts due to rigid adhesion to Professor Leff's two-prong procedural/substantive test).

69. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 771-75 (2002) (critiquing this view); *see also*

apply this theory and its tenets to form contracts by assuming consent and strictly enforcing form arbitration provisions without truly considering contextual and relational factors.[70]

Scholars have further used the law and economics model for predicting human responses to legal incentives based on this rational choice theory and the assumption that people act out of economic self-interest.[71] They posit that strict enforcement of form contracts fosters optimal economically efficient exchanges and hence wealth maximization. Thus, enforcement of form contracts results in cost savings companies may pass on to consumers through lower prices, lower interest rates, or higher quality, regardless of whether consumers actually read these contracts.[72] As noted above, many courts have adopted this same view in enforcing arbitration clauses regardless of whether parties have in fact read or considered the clauses at the time of contracting.[73]

Others acknowledge, however, that consumers rarely negotiate boilerplate that they may not read or understand.[74] Cognitive and behavioral theories consider more deeply individuals' strong likelihood to accept form terms, including arbitration clauses, without question.[75] Scholars' research findings confirm individuals' "tunnel vision," skewed by hindsight and outcome biases that assist digestion

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Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1387-90 (2001) (noting that courts generally enforce forum-selection clauses and that cases protecting consumers from manufacturers' contractual specifications of applicable law "are the exception rather than the rule"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1180-97 (1983) (also critiquing this view and its assumption of adequate opportunity to read and consent).

70. *See Hill*, 105 F.3d at 1147-50 (enforcing a form arbitration clause using an efficiency rationale).

71. *See* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 122-23 (2007) (explaining rational choice assumptions of consumer contracting as well as more nuanced implications of behavioral science); Russell Korobkin, *Bounded Rationality, Standard From Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204-06, 1222-25, 1243-44 (2003) (discussing how buyers may not act fully rationally to the extent they do not expend the time and resources necessary to maximize the accuracy or utility of their choices).

72. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-64, 292 (2006) (proposing that pre-dispute arbitration clauses benefit companies and consumers).

73. *See supra* notes 57-64 and accompanying text (noting formalistic and efficiency-focused application of contract defenses).

74. *See* Rakoff, *supra* note 1, at 1240-43.

75. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1074-75 (2000) (explaining aim of behavioral law and economics); Becher, *supra* note

of vast information, but lead to misperceptions and over-valuations of that information.[76] In contracting, this may cause individuals to ignore or undervalue arbitration terms, especially when they do not understand the terms' significance or expect eventual conflicts.[77]

Professor Korobkin has suggested that individuals' "bounded" rationality (human cognition is not perfect; we can be economically irrational) leads them to passively accept terms that operate without the need for active bargaining, even if those terms are contrary to standard industry practice or legal defaults.[78] This is the result of not only contractual "laziness," but also a fear of regretting action that may breed undesirable results.[79] Consumers are therefore predisposed to accept arbitration and other form terms that sellers provide on pre-printed forms that operate without action.[80]

This propensity is augmented by individuals' fear of "rocking the boat" or raising thorny issues of eventual disputes during contract negotiations.[81] Consumers may be especially reluctant to question boilerplate arbitration clauses where consumers have an inferior position in the seller/consumer status hierarchy.[82] Consumers know that sellers control needed resources and therefore have the power to offer these resources on the sellers' terms. This means consumers

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71, at 123-25 (explaining behavioral law and economics basics). Traditional economics counters these arguments as difficult to test. *See* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559-75 (1998) (critiquing behavioral law and economics as merely a psychological and sociological account of human behavior that "confuse[s] explanation and prediction" and lacks "theoretical ambition," and positing that it therefore cannot provide a useful model).

76. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307-22 (discussing various cognitive biases in the criminal context).

77. *See* Stark & Choplin, *supra* note 47, at 676-77 (summarizing cognitive and social psychological factors hindering consumers from reading or understanding contracts, and noting that consumers enter into contracts assuming no problems will arise).

78. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1607-09, 1627 (1998) (advancing "inertia theory" based on his findings that parties have an even stronger preference for default contract provisions than Coasean theorists might expect).

79. *Id.* (explaining how negotiators may avoid potentially deal-breaking departures from status quo contract terms).

80. *Id.*

81. *See* Macaulay, *supra* note 65, at 60-64 (explaining how detailed negotiations can turn "a cooperative venture into an antagonistic horse trade" and how "detailed negotiated contracts can get in the way of creating good exchange relationships between business units").

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

generally accept arbitration terms even when they bar class relief or other remedies consumers would otherwise want to retain under common and statutory law.[83]

Some scholars have used these contracting realities to critique arbitration and other form provisions. They argue that sellers take advantage of consumers' cognitive errors in dictating impenetrable form terms.[84] For example, in opposition to neoclassical economists' arguments that such legislation is inefficient, Professors Jolls, Sunstein, and Thaler have applied behavioral principles to explain why consumer protection legislation is appropriate to quell significant departures from usual trade and fairness norms.[85] They propose that legislation is necessary to protect consumers from their failure to guard their needs and long-term interests in the way neoclassical economists assume due to bounded rationality.[86]

Professor Becher similarly has advanced justification for consumer protections based on psychological and behavioral patterns he identifies as sunk cost effect, cognitive dissonance, confirmation bias, and low-ball technique.[87] He argues that companies take advantage of individuals' propensities to ignore low-probability risks, to overestimate risks regarding recent incidents, and to "under-react to contractual risks" due to consumers' own self-serving overconfidence about purchasing decisions.[88] Becher highlights how psychologists' "conflict model" for individuals' retreat from stressful situations indicates that consumers likely accept form contracts without reading or negotiating them due to stressful contracting contexts such as high-

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83. Korobkin, *supra* note 78, at 1627. This gives companies that draft form arbitration provisions considerable power in setting arbitration procedures, especially because consumers usually do not read or realize the significance of these procedures.

84. Becher, *supra* note 71, at 123-25.

85. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (providing an account of behavioral law and economics theory's foundations and analyzing it in positive, prescriptive, and normative terms, especially with respect to predatory lending laws).

86. *Id.* at 1476-81, 1546-47 (also expressing hope that economists and lawyers would incorporate empirical findings into their assumptions, thereby rendering traditional economics obsolete). *But see* Posner, *supra* note 75, at 1559-75 (critiquing behavioral theories as "confus[ing] explanation and prediction," lacking "theoretical ambition," and failing to provide a useful and applicable model); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 72-74, 125-132 (2002) (critiquing the behavioral law and economics view as based on only limited empirical research and as failing to precisely apply data to account for variation among decision-makers).

87. Becher, *supra* note 71, at 124-36 (explaining these various patterns).

88. *Id.* at 136-50.

pressure sales tactics and time limitations.[89] Moreover, the signaling power of signatures and information overload effects suggest that consumers are unlikely to give proper weight to electronic contracts ("e-contracts") loaded with form terms.[90]

At the same time, relational contract theorists have highlighted the importance of parties' connections and relationships in assessing the fairness and legitimacy of standardized pre-dispute arbitration provisions, particularly within close-knit exchange communities.[91] Some have discussed the importance of communal culture in accepting and using private dispute resolution procedures.[92] I have therefore proposed that such broad and textured relational factors may impact parties' differing needs, expectations, and understandings regarding dispute resolution.[93] These differences may justify arbitration regulations in certain uneven bargaining contexts but may amount to costly protectionism in other, more communal, contexts.

Pre-dispute arbitration clauses have become a norm in some consumer transactions, and they are generally enforceable. Furthermore, although many clauses contain onerous procedures that curtail consumer remedies, generally there is no duty to give special notice

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89. *Id.* at 151-64.

90. *Id.* at 160-78. *See also* Robert A. Hillman, *On-line Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, *in* IS CONSUMER PROTECTION AN ANACHRONISM IN THE INFORMATION ECONOMY? 283 (Jane K. Winn ed., 2006) (proposing requirements that electronic businesses make terms available on their websites, allow for "cooling off" periods, and follow substantive mandatory rules for forum selection and choice of law provisions).

91. *See* Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (analyzing the importance of the parties' relationships and reputation or goodwill incentives, and hence the "relational" nature, of long-term contracts); Macaulay, *supra* note 65, at 55-56, 60-62; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (exploring the cotton industry's reliance on intra-community rules and norms, and thus its development and use of a private legal system ("PLS")).

92. *See* Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOT. J. 249, 250-53 (1991) (highlighting the importance of cultural differences relating to ethnicity or nationality and recognizing similar differences due to race, gender, and age). Building on cognitive, behavioral, relational, and cultural ideas, I have proposed a "contracting culture" continuum that acknowledges the impacts of dispute resolution provisions in a particular communal context. Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123 (2007).

93. *See* Schmitz, *supra* note 92, at 123-72 (contrasting relational factors in commercial construction versus consumer contexts to the extent parties in these different contexts do or do not share connections and understandings regarding industry norms and applicable dispute resolution systems).

or explain these clauses in the absence of a fiduciary relationship.[94] Neoclassical economic theories support strict enforcement of form contracts, but behavioral and relational realities suggest that consumers do not fit the assumptions of economic rationality. This mixture of law, theory, and reality raises questions regarding the need for, and design of, arbitration disclosure regulations. Regulations may be warranted to protect consumers from onerous use of arbitration, but policymakers should design regulations in light of empirical data regarding content, contracting, and perceptions of consumer arbitration provisions.

III. The Landscape of Empirical Contract and Arbitration Research

The empirical research on consumer contracting choices and behavior is generally limited, especially with respect to arbitration provisions.[95] Emerging contract behavior studies merely focus on the "rationality" of consumers' choices based on monetary differences in contracts, or correlation of contract terms with market share or assent mechanisms.[96] Meanwhile, arbitration-related studies usually focus only on outcomes or reported satisfaction of those that have participated in dispute resolution processes.[97] This has left a research gap regarding consumers' attitudes and behaviors with respect to arbitration clauses in form contracts. My mixed-method and electronic survey research helps fill that gap.

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94. *See* Torrance v. Aames Funding Corp., 242 F. Supp. 2d 862, 869-70 (D. Or. 2002) (finding no duty to disclose or explain arbitration clauses in arm's length contracts). *But see* Daly v. U.S. Bancorp Piper Jaffray, Inc., No. 04-490, 2005 WL 590076, at *1-2 (Mont. Mar. 15, 2005) (unpublished table decision) (finding broker had a fiduciary duty to his client to explain the impact of a pre-dispute arbitration clause in their client/broker account agreement).

95. There are marketing studies and some academic studies that consider limited situations, but these do not truly explore contracting with respect to dispute resolution clauses. *See, e.g.*, Sumit Agarwal et al., Do Consumers Choose the Right Credit Contracts? (Nov. 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=843826 (reporting on a large U.S. bank's experiment comparing consumer credit card choices with respect to no annual fee/higher interest rate versus annual fee/lower interests rates when consumers do or do not carry balances).

96. Many commentators have been calling for more empirical studies exploring consumer attitudes and behavior with respect to form contracts. *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 Mich. L. Rev. 837, 840-43 & n. 24 (2006) (also noting how most commentators merely cite or quote Todd Rakoff's non-empirical piece, Rakoff, *supra* note 69, at 1179, for the proposition that consumers do not read standard form contracts).

97. Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. Disp.

A. *Behavioral Research*

As noted above, some scholars have predicted that consumers are unlikely to read and shop around for standard form contract terms.[98] In order to test this prediction, Professor Hillman surveyed 92 law students regarding their contracting practices.[99] One may expect the students surveyed to report contractual vigilance to their professor.[100] However, Professor Hillman found that beyond price and product description, only 4% of the students reported that they read their e-contracts for goods and services purchases "as a general matter," and 44% reported that they usually do not read terms beyond price and product description.[101] Seventeen percent reported that they read some particular terms such as warranties, product information, disclosures, and warnings for purchases.[102] Respondents' reported reasons for failure to read e-contracts were being "in a hurry" (65%), belief nothing will go wrong (42%), lack of diversity of others' terms (42%), belief terms will be fair (32%), and belief law will cure unfairness (26%).[103] Only 7% indicated that they compare form terms beyond price and product description despite the arguable ease of "shopping around" via the Internet.[104]

Others have empirically studied the "rationality" of consumers' credit practices. For example, Visa commissioned a survey of consumers about their credit card behavior.[105] The survey findings suggested that consumers are not as economically "irrational" as behavioral theorists have argued, to the extent that most consumers

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RESOL. 349 (noting the limited research on arbitration and providing a report based on the study of investors' perceptions).

98. *See supra* notes 78-83 and accompanying text (discussing work of Korobkin and others who have highlighted the unlikelihood that individuals will negotiate form contracts). *See also* Hillman & Rachlinski, *supra* note 61, at 446-86.

99. Robert A. Hillman, *On-line Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications* 25-30 (Cornell Law Sch. Research Paper No. 05-012, 2005), *available at* http://ssrn.com/abstract=686817.

100. *Id.* at 4-5 (acknowledging that the study was limited by the size and make-up of the sample).

101. Hillman also found through cross-tabulation that 36 of the 40 non-readers encompassed in the 44% would not read under any circumstances, while four of them may read depending on term, type of vendor, or value of the item purchased. Surprisingly, a larger percentage of the 92 respondents, 13%, reported that they do generally read contracts for their e-subscriptions to such online services as those for database searches, news, banking, dating, and phone. *Id.* at 7-9.

102. *Id.* at 8-12. Overall, roughly one-third stated that they would be more likely to read e-contracts for higher value products or when the vendor is unknown. *Id.* at 8.

103. *Id.* at 9.

104. *Id.* at 12.

105. Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not so Crazy*, 73 U. CHI. L. REV. 63, 63-77 (2006) (discussing the Payment System Panel Study ("PSPS")).

do not pay annual fees on their credit cards and the majority of those that do pay fees also carry revolving balances (presumably opting to pay a fee to receive a lower interest rate).[106] In addition, the findings did not support behavioral theorists' claims that consumers irrationally fall prey to "teaser" rates and high-interest cards that offer rewards.[107] Other research similarly has indicated that the majority of consumers generally choose economically beneficial credit cards for their borrowing practices.[108]

In contrast, some studies have shown that consumers sign up for credit cards based on "teaser" introductory rates, but "irrationally" fail to switch to lower-rate credit cards when teaser rates expire.[109] Research also has indicated that credit and banking markets have not responded efficiently with respect to changing conditions – instead, interest rates are "sticky."[110] Interest rates also have fallen during periods of rising bankruptcy filings, although economic models of consumer credit expect banks to tighten lending and thus increase rates during these times.[111] At the same time, evidence suggests there is a high correlation between credit card debt and bankruptcy filings.[112]

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106. *Id.* at 77-83.

107. *Id.* at 81-83 & figures 2 & 3.

108. Agarwal et al., *supra* note 95 (studying consumers' selection between two credit cards a U.S. bank offered to over 150,000 of its account holders). The study examined holders' choices between one card with a higher interest rate and no annual fee and the other with a fee but a lower rate. The researchers found that 60% selected the economically optimal card for their borrowing practices, and that the avoidable charges consumers bear due to their erroneous choices are fairly small (i.e., a roughly $25 annual fee). The study also indicated that the likelihood of erroneous choice decreases as the magnitude of error costs increases, suggesting that consumers learn from mistakes.

109. Haiyan Shui & Lawrence M. Ausubel, *Time Inconsistency in the Credit Card Market*, 14TH ANNUAL UTAH WINTER FINANCE CONFERENCE (May 3, 2004), *available at* http://ssrn.com/abstract=586622. *See also* David B. Gross & Nicholas S. Souleles, *Do Liquidity Constraints and Interest Rates Matter for Consumer Behavior? Evidence from Credit Card Data*, 117 Q.J. ECON. 149, 180 (2002) (finding that consumers leave money in low-rate checking accounts although they fail to pay off credit cards at far higher rates).

110. Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481 (2006) (discussing such "sticky" interest rates and their interaction with consumer behavior); Paul S. Calem & Loretta J. Mester, *Consumer Behavior and the Stickiness of Credit-Card Interest Rates*, 85 AM. ECON. REV. 1327 (1995) (finding sticky credit card interest rates during the 1980s and early 1990s).

111. Block-Lieb & Janger, *supra* note 110, at 1501-08.

112. *Id.* at 1521-24. *See also* Ronald J. Mann, *Credit Cards, Consumer Credit, and Bankruptcy* (Univ. of Tex. Sch. of Law Working Paper No. 44, 2006) (finding correlation through regression analysis, but failing to account for endogeneity problems), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690701.

This sampling of behavioral research provides mixed and uncertain evidence regarding consumers' propensity to read, negotiate, and otherwise act in an economically rational manner with respect to their contracts.[113] At the least, this evidence suggests that consumer contracting is more complex than economic models predict. It also raises questions regarding the efficacy of heightened disclosure regulations, and whether they have a meaningful impact on consumers' awareness and consideration of non-price terms such as arbitration clauses – especially when consumers may already be prone to ignore fee and interest terms, which are tantamount to price.

B. *Contract Term Studies*

Most of the other empirical studies of consumer contracts are quantitative studies of gathered contract terms. For example, a study of companies' appliance warranty terms in the early 1980s indicated no significant relationship between the terms' restrictiveness and the companies' market concentrations.[114] Similarly, a more recent study of companies' End-User License Agreements ("EULAs") in terms of their "pro-buyer" or "pro-seller" content with respect to 25 standard terms indicated that higher market share generally did not lead to more pro-seller terms.[115] Overall, the author concluded that competition impacts price and other "salient aspects of product quality but has weaker effect on less salient aspects, such as standard terms."[116]

This same EULA study nonetheless suggested that there is a possible correlation between market power and arbitration

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113. *See* Becher & Unger-Aviram, *supra* note 12, at 1-23 (draft paper reporting results from a new study of consumer contracting behavior both supporting and refuting rational actor assumptions). Nonetheless, this research is limited by its sample's small size, self-selection, and student demographic, and it does not test many salient social and cognitive factors that may impact contracting. *See id.* The study is also limited by its reliance on these students' reports of what they would do and not necessarily what they have done with respect to contracts. *Id.* at 23.

114. George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1319-25 (1981) (comparing gathered warranty terms with respect to how restrictive their provisions were on consumer rights and remedies, and correlating restrictiveness with the drafters' market shares). These findings contravened what one may predict based on monopoly theory. *Id.*

115. Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008) (creating seven categories of standard terms and using a system of adding/subtracting points depending on her assessment of terms as more "pro-buyer" or "pro-seller" than the applicable U.C.C. Article 2 default rules).

116. *Id.* at 451.

clauses.[117] Seventy-five percent of the EULAs studied had choice of law clauses, 28% had choice of forum clauses, and only 6% had arbitration clauses.[118] In this small sample of EULAs with arbitration clauses, most of the clauses also specified application of the drafters' home state laws and administration by the AAA,[119] but they did not appear to impose pro-seller regimes.[120] These findings are nonetheless limited to the extent the EULAs involve a narrow market.[121]

Another study turned more broadly to consumer e-contracts of *Internet Retailer*'s 2005 top 500 companies, focusing on the assent mechanisms these companies used for e-contracts.[122] The researchers reviewed the e-contracts and coded them according to an eight-point continuum of assent level required, ranging from pure browse-wrap, requiring no active indication of agreement, to robust click-wrap, accompanied by electronic documents users must actively accept before completing registration or purchase.[123] They then correlated assent levels with each company's market share and use of "pro-seller" contract terms such as disclaimers, damage caps, and arbitration clauses.[124] They found that barely 10% of the dataset required consent beyond pure browse-wrap, and that arbitration

117. *See generally id.* at 473-75 (concluding that her results cast doubt on assumptions that competition conditions significantly impact standard terms, but noting a correlation between higher prices and lower competition). Professor Marotta-Wurgler discussed the EULA study first with respect to form contract terms generally and later with respect to dispute resolution clauses. *See* Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?* (N.Y. Univ. Law & Econ. Research Paper No. 08-08, 2008), *available at* http://ssrn.com/abstract=1093293 (explaining focus of this new trajectory of her analysis of EULAs).

118. Marotta-Wurgler, *supra* note 117, at 10-16 (also finding that use of these different types of dispute resolution provisions was generally the same across business and consumer sectors, and finding some evidence that larger and younger companies were more likely to include choice of law clauses, possibly because larger companies have more access to legal counsel in drafting their contracts).

119. *Id.* at 20-21 (noting that 25 of the 34 studied EULAs with arbitration clauses selected the AAA, arguably recognizing the AAA's supplementary procedures for consumer disputes).

120. *Id.* at 22.

121. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 64 (2004) (finding arbitration provisions in 35% of studied consumer contracts).

122. Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting* 1-3, 20-24 (Univ. of Tex. Law & Econ. Research Paper No. 104, 2007), *available at* http://www.utexas.edu/law/academics/centers/clbe/papers.html.

123. *Id.* at 14-17.

124. *Id.* at 16-25 & n. 51 (also categorizing choice of law/forum, statute of limitations, and jury/class action waivers as pro-seller, but essentially including these later waivers with arbitration clauses).

clauses appeared in less than a tenth of the contracts (44 of the 500 retailers).[125] They nonetheless found that companies used more robust mechanisms that required proactive consent with respect to pro-seller terms, suggesting that companies may design their websites to ensure the enforceability of these terms.[126]

Although at least one study has shown fairly consistent use of arbitration clauses,[127] a more recent study indicated that companies do not prefer arbitration over litigation in all their dealings. Researchers looked at 26 consumer contracts and 164 non-consumer contracts from 21 corporations in sectors including cellular phone, cable, brokerage, and banking services and found that arbitration clauses appeared in more than 75% of the companies' consumer contracts but fewer than 10% of the negotiated business agreements.[128] They also found that all the consumer arbitration clauses included class proceeding waivers, and 60% voided the arbitration provision if class proceedings were ordered.[129] The researchers concluded that these findings suggest that companies do not view arbitration as superior to litigation overall, but instead "value arbitration clauses for their effects in suppressing aggregate proceedings by consumers, and perhaps averting liability for widespread but low-value wrongs."[130] Companies used arbitration clauses strategically to stymie consumer access to remedies by preventing aggregate proceedings, which are often consumers' only economically viable means for asserting small claims.[131]

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125. *Id.* at 20-23 (noting surprise at these findings about arbitration, especially in light of other evidence that arbitration clauses are now standard in credit card contracts).

126. *Id.* at 36-38 (adding that it is still surprising how many companies include pro-seller terms in their contracts without enforceable assent interfaces).

127. *See* Eisenberg et al., *Summer Soldiers*, *supra* note 15, at 877-81 (describing other research and reporting their pre-study hypothesis that companies who advocate arbitration in their consumer contracts would similarly use arbitration in their other contracts).

128. *See* Eisenberg et al., *Mandatory Arbitration*, *supra* note 15, at 118-23 (finding arbitration clauses in 92.9% of employment contracts and 76.9% of consumer contracts, but only 6.1% of non-consumer business contracts); Eisenberg et al., *Summer Soldiers*, *supra* note 15 (examining arbitration clauses in contracts of companies in or nearly in *Fortune* magazine's top 100 companies).

129. Class litigation waivers and non-severability provisions voiding arbitration if class arbitration is awarded were significantly more prevalent in consumer than in non-consumer business contracts. Eisenberg et al., *Summer Soldiers*, *supra* note 15, at 884-86.

130. Eisenberg et al., *Mandatory Arbitration*, *supra* note 15, at 120-23.

131. *Id.* at 121-23 (also concluding that the "study suggests that the asserted benefits of arbitration – fair outcomes arrived at faster and at lower cost – are not the dominant motives for inclusion of arbitration clauses in consumer contracts in the

Still, there is some evidence of companies' beneficial use of arbitration clauses in their business-to-business dealings, especially in international contexts. A study of international agreements among businesses indicated higher use of provisions requiring arbitration or other external dispute resolution procedures in complex contracts.[132] This suggests that companies rationally use these clauses to temper the costs and risks of litigation in accordance with Coasean economic theory and to assist resolution of textured contract and cooperation problems.[133] These companies are therefore more prone to invest resources in arbitration and private dispute resolution provisions when involved in complex exchanges.

These studies of contract terms provide some insight into companies' use of arbitration, but they are limited and inconclusive. The EULA study targeted licenses, while the assent mechanism study indicated companies fear unenforceability of their pro-seller terms such as arbitration. Furthermore, the study most on point in assessing frequency of arbitration clauses in companies' consumer versus other contracts suggested that companies strategically use arbitration and class action waivers to quell consumers' claims.

C. *Arbitration Outcomes and Satisfaction*

There have been limited studies of arbitration outcomes and of disputants' perceptions of their satisfaction and experiences with arbitral dispute resolution processes. The outcome studies generally look at the "win" rates consumers or employees enjoy in arbitration, defining "win" in various ways. Some also compare award amounts parties obtain through arbitration versus litigation, but these studies often fail to consider settlements or adjust for summary judgments and dismissals. In addition, the satisfaction studies are arguably clouded by hindsight biases because they usually focus only on participants' perceptions of arbitration after their cases have been resolved.

Outcome studies have provided mixed evidence that "weaker" parties such as consumers and employees fare better in arbitration

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industries we studied"). *See also* Eisenberg et al., *Summer Soldiers*, *supra* note 15, at 882-83, 894-95 (finding 90% of the employment contracts had arbitration clauses and highlighting how companies would presumably include arbitration clauses in all their contracts if they found it superior to litigation).

132. Koremenos, *supra* note 67, at 189-210 (gathering over 50,000 contracts registered with the United Nations and breaking this down to a random sample of 88 agreements for analysis).

133. *Id.* For further discussion of Coasean theory generally, see R.H. COASE, *The Nature of the Firm*, *in* THE FIRM, THE MARKET, AND THE LAW 33 (1988).

than litigation.[134] One study indicated that employees won 73% of AAA employment arbitrations in 1992, and employees won significantly more cases in arbitration than litigation from 1993 to 1995.[135] However, the AAA reported that in the 310 consumer arbitrations it administered from January through August 2007, consumers prevailed in 48% of the cases they filed as claimants, while businesses prevailed in 74% of the cases they filed.[136] It also reported that 41% of all arbitrated cases were resolved on the documents only and produced awards in approximately four months (versus six months for in-person hearings).[137] Nonetheless, an AAA representative reported that consumers enjoyed "favorable" outcomes overall in 81% of the cases they filed in 2006 if one takes into account settlements and monetary awards.[138]

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134. *See generally* Eisenberg et al., *Summer Soldiers*, *supra* note 15, at 871-74 & nn. 6-8.

135. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45-50 (1998) (discussing studies of employment arbitration outcomes).

136. Am. Arbitration Ass'n, Analysis of the American Arbitration Association's Consumer Arbitration Caseload, http://www.adr.org/si.asp?id=5027 (last visited Feb. 6, 2010) (noting that although the AAA administers roughly 1,500 consumer cases each year, it limited its analysis to the 310 arbitrated cases that resulted in awards).

137. *Id.* The AAA also states that it applies its SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES when it administers what qualify as "consumer" cases, defined as those "between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services" are primarily "non-negotiable." *Id.* This excludes residential construction cases, which accounted for 937 cases in 2005 and 1,119 in 2006. E-mail from Jennifer Jester Coffman, Senior Vice President of the Am. Arbitration Ass'n, to Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Law Sch. (June 6, 2007) (on file with author).

138. *See* E-mail from Wayne Kessler, Vice President, Corporate Communications, Am. Arbitration Ass'n, to Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Law Sch. (Jan. 14, 2008) (on file with author). The AAA had previously indicated that it administered 1,294 consumer arbitration cases in 2006. *See* E-mail from Jennifer Jester Coffman, Senior Vice President of the Am. Arbitration Ass'n, to Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Law Sch. (June 6, 2007) (on file with author). The AAA also indicated that in 2005 it received 1,652 consumer disputes including claims related to banking, lending, credit cards, mortgages, education, home construction, wireless phones, real estate, car sales, warranties, accounting, and financial advice. *See* E-mail from Jennifer Jester Coffman, Senior Vice President of the Am. Arbitration Ass'n, to Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Law Sch. (Mar. 16, 2007) (on file with author). Sixty-eight percent of these disputes involved claims of less than $75,000. *Id.*; *see also* Am. Arbitration Ass'n, Consumer Arbitration Statistics, http://www.adr.org/sp.asp?id=29470 (last visited Jan. 27, 2010); ERNST & YOUNG LLP, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf (reporting that in the lending-related NAF consumer arbitrations Ernst & Young studied in the early 2000s, 55% were resolved in the consumer's favor and a majority of the consumers surveyed were satisfied with

Some researchers have focused on securities arbitration due, in part, to its impact on consumer investors who generally have no choice but to have their securities claims resolved by NASD or NYSE pursuant to industry forms and norms.[139] Fairness concerns have fueled this attention in light of findings indicating a steady decline in investor-claimant win rates in securities arbitrations from 1999 to 2004, and overall "win" recoveries of roughly 50% of amounts claimed.[140] For example, researchers studied securities arbitrators' awards in light of their backgrounds and political ideologies. They found that arbitrators who also represent brokers award less compensation to investor-claimants than other arbitrators.[141]

Nonetheless, a study of survey responses from 3,087 participants in securities arbitrations regarding their satisfaction with the process indicated that customer respondents generally had positive views of the arbitrators' competence and attentiveness.[142] However, customers reported less satisfaction with outcomes, arbitrators' impartiality,

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the arbitration process); CALIFORNIA DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE (2004), *available at* http://www.mediate.com/cdri/cdri_print_Aug_6.pdf (providing findings regarding use of arbitration and outcomes).

139. Stephen J. Choi et al., *Attorneys as Arbitrators* (N.Y. Univ. Law & Econ. Research Paper No. 08-18; Univ. of Mich. Law & Econ. Olin Working Paper No. 09-001, 2009), *available at* http://ssrn.com/abstract=1086372 (survey of 422 randomly selected arbitrators and their 6,724 awards from mostly NASD securities proceedings from 1992 to 2006).

140. *Id.* at 12 (discussing a prior study by Edward S. O'Neil and Donald R. Solin done without NASD support). Note that this arbitration is quasi-public to the extent it is subject to Securities and Exchange Commission (SEC) oversight. *Id.*

141. *Id.* at 15-16, 21-23, 36-37 (noting that this supported their arguments that the 1998 securities arbitration reforms have advantaged repeat-players and that the 2004 reforms did little to counteract conflict of interest concerns). The study also linked arbitrators' political leanings with their awards. *Id.* at 21-37. This is not unique to arbitrators. *See* Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (finding Democratic or Republican political leanings do have some impact on judges' decisions, especially in affirmative action, sexual discrimination/harassment, Title VII, and certain business cases).

142. Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration* 7-9, 35-37 (Univ. of Cincinnati Coll. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 09-12, 2008), *available at* http://ssrn.com/abstract=1118430 [hereinafter Gross & Black #1118430] (noting academic support for the importance of perceptions in explaining why their study asked participants about their perceptions about arbitrators' competence, impartiality, and awards); Jill I. Gross & Barbara Black, *Perceptions of Fairness of Securities Arbitration: An Empirical Study* (Univ. of Cincinnati Coll. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 08-01, 2008), *available at* http://ssrn.com/abstract=1090969 [hereinafter Gross & Black #1090969] (assessing participants' perceptions of the fairness of securities arbitration, competence

and the overall fairness of the arbitration process.[143] Over 75% of customer respondents answered "very unfair" or "somewhat unfair" when asked "[h]ow fair is securities arbitration as compared to court," and only 35.6% of these respondents said they would choose arbitration over litigation in the future.[144] In addition, customers reported that they lacked knowledge about the securities arbitration process, presence of "industry arbitrators" on the panels, and generally how the arbitrators perform or make decisions.[145] The researchers concluded that these findings overall indicated that the customers do not view arbitration as fair and economical for all parties involved.[146] These perceptions are nonetheless tempered by evidence that investors generally fare better in arbitration than in litigation.[147]

Another survey focused on pre- and post-process perceptions and satisfaction with respect to dispute resolution; it highlighted the need for dispute resolution education.[148] The survey findings indicated that the disputants' initial perceptions of dispute resolution processes did not impact what processes they ultimately used. The researchers surmised that this was likely due to parties' reliance on their lawyers

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of securities arbitrators, and fairness of arbitration outcomes – all in comparison to litigation).

143. Gross & Black #1090969, *supra* note 142, at 37-39, 41-45 (discussing the findings based on Likert scale questions). Sixty-three percent of the customers they surveyed disagreed with the statement that "as a whole, I feel the arbitration process was fair." *Id.* at 45.

144. *Id.* at 46-48.

145. Gross & Black #1118430, *supra* note 97, at 40-41 (noting the percentages of customers who reported they "did not know" to many questions about the arbitration processes in which they participated).

146. Gross & Black #1090969, *supra* note 142, at 52-53. This led Gross and Black to conclude that it is critical for policymakers to design securities reforms aimed at tempering perceived bias of industry arbitrators and lack of transparency in securities arbitration processes. *Id.* at 51-59.

147. Jill I. Gross, McMahon *Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 496-99, 517-20 (2008) (addressing the propriety of the Supreme Court's endorsement of securities arbitration in *McMahon* premised on assumed SEC fairness regulation, and explaining why securities arbitration is the better alternative for investors).

148. Donna Shestowsky & Jeanne M. Brett, *Disputants' Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study* 1-5, 21-26 (Univ. of Cal., Davis, Legal Studies Research Paper No. 130, 2008), *available at* http://ssrn.com/abstract=1103585 (discussing a longitudinal field study involving 108 completed paper surveys of disputants with cases filed in late 2004 and early 2005, followed by telephone surveys with 44 of these disputants concerning their cases; of these, 26 were settled, negotiated, dismissed, or dropped, nine went to trial, one went to mediation, and one went to arbitration).

and lack of necessary knowledge or experience regarding dispute resolution processes to make their own informed assessments.[149]

Overall, the available research about process satisfaction indicates a lack of consumer information and understanding about arbitration. Although the research is mixed, there is evidence that companies do not necessarily use market power to impose onerous arbitration clauses, and consumers often fare well in arbitration. Nonetheless, other evidence indicates that some companies do use arbitration to consumers' disadvantage, and consumers generally have negative perceptions and voice dissatisfaction with arbitration. Although some consumer negativity may be unwarranted, there is need to rein in abusive practices and provide consumers with effective disclosures and better information about arbitration processes.

IV. Multi-Pronged Arbitration Contract Research

Contract term and arbitration satisfaction or outcome studies have left research gaps regarding consumers' contracting behavior and understanding of arbitration clauses. Some scholars have highlighted these gaps, inviting further qualitative study in the form of interviews and surveys to provide a more complete understanding of arbitration clauses.[150] My mixed-method research provides this type of data. Accordingly, I will give a synopsis of my findings from gathering arbitration terms in consumer wireless phone service and credit card contracts. I will then add findings regarding consumers' perceptions and understandings of arbitration clauses from the consumer focus groups I held in Denver and my recent electronic survey of Colorado consumers.

A. *Gathered Arbitration Clauses*

As noted above, other studies have shed light on companies' use of arbitration clauses in EULAs, international contracts, and consumer versus commercial contracts.[151] My study focused on collection and analysis of arbitration clauses in wireless phone service and

149. *Id.* at 30-42 (concluding that courts could improve disputants' ex post satisfaction by subsidizing the neutral's fees for court-mandated ADR and giving disputants the option of pursuing trial).

150. *See* Mann & Siebeneicher, *supra* note 122, at 40 (noting this with respect to their findings suggesting a close relation between industry concentration and arbitration clauses). My study attempts to provide more of the qualitative picture of consumers' contracting with respect to arbitration clauses.

151. *See supra* Part III (discussing prior research).

credit card contracts. Although this was fairly unscientific and involved small samples, the work adds to the research landscape by focusing on common consumer contracts in industries that have been targeted for corporate use of arbitration to curb consumers' access to class action and statutory remedies. This research also builds on findings that industry concentration may be closely related to use of arbitration clauses.[152]

1. *Consumer Credit Card Contracts*

My collection and analysis of arbitration clauses began with credit card companies' form contracts due to reports that companies use these clauses to consumers' disadvantage.[153] Such reports contributed to a law barring arbitration requirements in active duty military members' consumer credit contracts and have generated support for legislative initiatives to bar arbitration clauses in consumer contracts more generally.[154] Furthermore, credit card companies have been the target of growing numbers of consumer challenges of arbitration clauses, including antitrust claims that banks have illegally colluded to force consumers to accept arbitration clauses.[155]

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152. *See* Mann & Siebeneicher, *supra* note 122, at 40 (noting correlation); Eisenberg et al., *Summer Soldiers*, *supra* note 15, at 882-85, 890-92 (highlighting companies' disparate use of arbitration clauses in consumer versus non-consumer contracts).

153. *See* Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1591 PLI/CORP. 35, 49 (2007) (including Citibank, Chase, AMEX, Discover, Bank of America, Capital One, Washington Mutual, MBNA, and GE Capital in list of arbitration users); PUBLIC CITIZEN'S CONGRESS WATCH, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), *available at* http://www.citizen.org/publications/print_release.cfm?ID=7545 (summarizing results of the consumer advocacy group's examination of the credit card industry's use of arbitration); *see also id.* at 1 (concluding that "binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers"); Collected Wireless Phone and Credit Card Arbitration Provisions (chart on file with author) (last updated Mar. 2008) [hereinafter Collected Arbitration Provisions] (finding such prevalent use).

154. National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a), 120 Stat. 2083 (codified at 10 U.S.C. § 987 (2006)) (making arbitration clauses unlawful in consumer credit contracts with military service members); Arbitration Fairness Act ("AFA") of 2009, H.R. 1020, 111th Cong. (2009) (proposed, but not passed, bill barring enforcement of pre-dispute arbitration clauses in consumer, employment, and franchise contexts); Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (2007) (identical bill that has continually been proposed for barring arbitration clauses in consumer, employment, and franchise contracts).

155. Westlaw Search Results for "arbitration w/20 "credit card" & da(aft 1/1/2007)" in ALLCASES database retrieved 208 cases on March 10, 2009 (on file with author). The same search on June 6, 2008, retrieved 136 cases, indicating that the cases keep piling up (on file with author). *See also* Ross v. Bank of America, N.A., 524 F.3d 217,

As an initial matter, it was notably difficult to obtain copies of consumer credit contracts in order to analyze their inclusion of arbitration clauses. My research indicated that credit card companies usually provide only basic interest rate and "special offer" or "bonus" information on their websites and mailed offers. They rarely include or make available their full form contract terms. Furthermore, they generally will only allow a consumer to obtain a copy of the contract after the consumer has become a customer, or at least has applied for a card.[156] Nine of the largest credit card companies refused phone requests for copies of their form credit card contracts prior to submitting a credit application, and none of the twenty companies I wrote to with requests for advance copies of their contracts have sent the copies.[157]

In the end, thirteen credit card contracts were gathered and updated through requests from companies and independent research.[158] These were then charted in terms of existence and content of their arbitration provisions, as well as information the contracts provided

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223-26 (2d Cir. 2008) (holding that consumers allege sufficient injury in fact to proceed with their antitrust claims against credit card companies for colluding in the use of arbitration clauses).

156. Collected Arbitration Provisions, *supra* note 153. The collection and updating since June 2007 has been difficult and inexact due to companies' refusals to provide copies of their contracts beyond general rate and fee information. I gathered some of the contracts using copies obtained from my own credit cards or from students and friends, but most of the companies we contacted to obtain their terms have not provided copies despite phone calls, e-mails, and letters. *See, e.g.*, Letters to Credit Card Companies and Research Assistant Chronicles [hereinafter Letters], Letters from Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Law Sch. (Feb. 6, 2008) (showing attempts to obtain contracts) (record of letters and research assistant log of calls to credit card companies on file with author).

157. Letters, *supra* note 156. For example, a research assistant reported that he called Chase to obtain a copy of their terms and conditions but the phone representative refused to send him a copy until he became a card holder, even after he explained that he did not want to apply for a card until after he knew the terms. *See* E-mail from Aaron Clippinger, Research Assistant, to Amy J. Schmitz, Assoc. Professor, Univ. of Colo. Law Sch. (May 31, 2008) (Chase representative nonetheless suggested that the terms might be available to someone who has been pre-approved for a credit card).

158. *See id.* For example, U.S. Bank and Chase AARP Visa representatives informed my research assistant that she could not obtain a Cardmember Agreement until she applied and received a credit card from the respective companies. *See* Notes from Dana Jozefczyk to Amy J. Schmitz, Boulder, Colo. (Feb. 2008) (chart on file with author); *see also* Eisenberg et al., *Mandatory Arbitration*, *supra* note 15, at 120 n.8 (noting how credit card companies will not provide their full consumer agreements until after one has submitted personal information and been approved for a card and describing a company representative's refusal to provide an advance copy of the company's contract on grounds it "did not furnish its contracts to 'just anyone'").

regarding APRs and other fees. Of these thirteen credit card contracts, three did not include pre-dispute arbitration clauses and one allowed the consumer to opt out of the arbitration clause within thirty days of receiving the terms by sending written notice to the company.[159] Two of the companies' credit applications provided a brief statement that they required consumers to submit any disputes to binding arbitration under terms contained in the complete Customer Agreement, which consumers may obtain only after becoming credit card customers.[160]

The seven contracts with full arbitration provisions varied in length, specificity, and content regarding procedures and remedies.[161] Four of the provisions complied with the Consumer Due Process Protocol noted above to the extent that they allowed consumers to bring qualifying cases to small claims court, and five specified that the arbitration take place in the consumers' home location.[162] Six provided for some degree of company advancement or payment of arbitration filing fees.[163] Examples included payment for all costs, those over $2,500, or those over what the consumer would have paid had the claims been filed in court.[164] Nonetheless, all of the contracts' arbitration provisions expressly precluded class action or consolidated proceedings of any kind, in court or in arbitration.[165] This confirms prior research indicating companies' use of arbitration clauses in consumer contracts to bar class relief and limit consumer claims.[166]

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159. Collected Arbitration Provisions, *supra* note 153.

160. *Id.* These contracts also stated that all terms may be changed at any time.

161. Collected Arbitration Provisions, *supra* note 153. Some arbitration provisions were very difficult to read in terms of length and small typeface, even for a law professor.

162. *Id.*

163. *Id.* Some of these contracts nonetheless allowed for any fee advanced by the company to be reallocated for payment by the consumer in the award. One contract also specified that the consumer would pay for fees required in conjunction with any consumer-requested appeal to a three-arbitrator panel. *Id.*

164. *Id.* In between the extremes, one provided that the company would pay any costs over what the consumer would pay to file in court and the other required the company to pay filing fees over $500 plus administrative and arbitrator fees for two days of hearings. *Id.*

165. *Id.* Some of the contracts also specified that the arbitration provision becomes void if class arbitration is ordered despite the contracts' preclusion of such class relief. *Id.*

166. It seems companies began expressly precluding class arbitration in the wake of arbitration providers' allowance for such proceedings. Collected Arbitration Provisions, *supra* note 153. *See also supra* notes 127-31 and accompanying text (discussing Professor Eisenberg et al.'s research comparing companies' use of consumer versus non-consumer contracts).

In addition, although the small sample size did not allow for meaningful statistical analysis, the credit card contracts studied did not indicate that the companies using arbitration clauses passed on savings from these clauses through lower rates and fees. Instead, the credit unions generally had the lowest rates regardless of whether they required arbitration. In addition, the three credit card agreements with the highest interest rates at the time the clauses were studied all were careful to preclude class action relief.[167] It was telling on a broader level to see the often surprising additional fees the companies charge for everything from copies to making payments by telephone.[168] Although these rates and fees very well may relate to other risk, cost, and market issues, they at least call into question economists' arguments that companies pass on arbitration-related cost savings to their customers.[169]

2. *Wireless Phone Companies' Consumer Contracts*

In tandem with the above research, I gathered wireless phone service contracts from the nine major providers with a presence in Colorado. All of the companies required arbitration of consumer claims. They did this as a blanket mandate or by giving either party the right to require arbitration of any dispute that arises. Again, this was a limited sample. However, their blanket use of arbitration clauses supports procedural unconscionability claims that consumers generally have no true choice when it comes to arbitration of wireless service claims.

The wireless service companies studied did not appear to impose more onerous arbitration provisions on consumers in exchange for better rates, features, coverage, support, and phone selection. Although the small sample was not statistically analyzed, the wireless service rankings done by Consumer Reports and other independent organizations gave top ratings to two of the companies with the most Protocol-compliant arbitration clauses among those studied to the extent that they required the companies to pay all or most filing fees and allowed consumers to use small claims court remedies.[170]

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167. Collected Arbitration Provisions, *supra* note 153.

168. *Id.* (e.g., one company charges $25 for a dishonored check, $6 for copies, and $15 for a phone payment).

169. *Compare* Ware, *supra* note 72, at 254-64, 292 (proposing benefits of arbitration clauses) *with* Collected Arbitration Provisions, *supra* note 153.

170. *See* Collected Arbitration Provisions, *supra* note 153; TopTenREVIEWS, Inc., 2010 Cell Phone Providers Review Comparisons, http://cell-phone-providers-review.toptenreviews.com (last visited Feb. 12, 2010) (placing Verizon and AT&T at the top per cost, plan, features, coverage, phone selection, and support).

In addition, regardless of company rankings, all nine of the companies' contracts reviewed included explicit waivers of class or consolidated proceedings in either court or arbitration.[171] Five of the contracts went further to expressly void the arbitration requirements if class proceedings were ordered.[172] This confirmed others' research finding the prevalence in consumer contracts of class action waivers and non-severability provisions voiding arbitration clauses if class arbitration is ordered.[173] It also raised concerns regarding companies' strategic use of these clauses to effectively avoid liability for large-scale but small-dollar consumer claims, even if that means choosing litigation over arbitration out of fear that arbitrators will order class arbitration using their discretion or provider rules.[174] Although companies aim to avoid class actions in any venue, it seems they prefer to at least have judicial constraints on any class proceedings they cannot avoid.

The arbitration provisions reviewed also exemplified how merchants slide questionable provisions into arbitration clauses that may not pass judicial muster if outside of the FAA's pro-enforcement glaze.[175] All of the class waivers appeared in generally lengthy arbitration or dispute resolution clauses. Furthermore, most of the clauses contained confusing terms that could negatively impact consumers' claims. For example, one of the lengthy arbitration requirements precluded claims after two years from when they arose and further stated:

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171. Collected Arbitration Provisions, *supra* note 153.

172. One typical contract accessible on the Internet stated among its lengthy terms in white typeface on a black background, "(6) We each agree not to pursue arbitration on a classwide basis. We each agree that any arbitration will be solely between you and us (not brought on behalf of or together with another individual's claim). If for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then our agreement to arbitrate doesn't apply and the dispute must be brought in court." In addition, the contract included another clause in all capital letters precluding class relief of any kind in court or arbitration under any circumstances. Boostmobile, Terms and Conditions of Service, http://support.boostmobile.com/service_policies/terms.html (last visited Feb. 12, 2010).

173. *See supra* notes 127-33 and accompanying text (discussing research finding use of class waivers in consumer, but not other commercial, contracts of top companies).

174. *See, e.g.*, Am. Arbitration Ass'n, AAA Policy on Class Arbitrations (July 14, 2005), http://www.adr.org/sp.asp?id=25967 (last visited Feb. 27, 2010); AM. ARBITRATION ASS'N, SUPPLEMENTAL RULES FOR CLASS ARBITRATIONS (effective Oct. 8, 2003), *available at* http://www.adr.org/sp.asp?ID=21936 (allowing for class arbitration proceedings if an agreement allows class arbitrations or is silent on the issue).

175. *See supra* notes 129-31 and accompanying text (discussing research finding use of arbitration clauses to bolster enforcement of otherwise questionable limitations on consumers' access to remedies).

> Notwithstanding the foregoing [the company] has the right to institute legal or equitable proceedings in any court of competent jurisdiction for claims or disputes regarding: (i) amounts owed by you in connection with your purchase of Service, or (ii) your violation of the provisions of this Agreement.[176]

This not only preserves the companies' access to court, but also appears to free the company from the two-year time limitation imposed on consumers.[177]

Overall, most of the arbitration terms reviewed in the credit card and wireless service contracts were buried in long form contracts, and often appeared in unnoticeable or small typeface.[178] The terms also were slipped in "bill stuffers" or included in e-contracts accessible only through website links or "pop-ups" that consumers could easily bypass or overlook.[179] However, a few of the arbitration clauses were in bold or all capital letters and directed consumers to arbitration providers' websites for further information regarding administration of any proceedings.[180]

3. *Lessons Learned*

This limited review of contract terms is not particularly scientific and is by no means exhaustive. Nonetheless, it adds to the research picture with respect to consumer markets in which companies generally have great power and consumers have little choice but to accept

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176. MetroPCS, Terms and Conditions of Service, http://www.metropcs.com/privacy/terms.aspx (last visited Feb. 27, 2010).

177. Of course, a court may interpret this differently or sever it from the arbitration clause using a contract defense. Nonetheless, this provision seems particularly onerous due to the breadth of the concluding carve out.

178. For example, the Boost Mobile arbitration provisions referenced above, accessible on the company's website, filled two pages toward the end of the Terms and Conditions in white typeface on a black background and specified that consumers accept these terms and conditions simply by accessing the web site. *See* Boostmobile, Terms and Conditions of Service, *supra* note 172.

179. This coincides with others' research of companies' consumer e-contracting practices. *See* Mann & Siebeneicher, *supra* note 122, at 20-24 (finding fewer than 10% of the 500 Internet retailers' e-contracts studied required assent to e-contract terms beyond pure browse-wrap).

180. *See* Alltel Wireless, Terms and Conditions, http://tinyurl.com/yjpkyy2 (last visited February 21, 2010) (relatively simple clause under "ARBITRATION"). The clause required the company to pay administrative costs exceeding those the consumer would pay in court. Still, the brief clause precluded class relief, required the parties to bear their own costs of preparing their cases, and denied the arbitrator any authority to modify any of the contract's terms, including the term's limitation of liability section. *Id.*

contract terms as presented.[181] My review mostly confirmed claims that companies use arbitration clauses to limit their vulnerability to consumer claims, especially class actions.

The difficulty of obtaining credit card contracts and the overall presentation of the contracts obtained contradicted research noted above indicating companies' use of more robust assent mechanisms with respect to arbitration clauses in their e-contracts.[182] Instead, my research indicated that at least in the wireless service and credit card contexts, powerful companies dictate consumer form terms, knowing consumers generally cannot "shop around" for optimal contracts. This is especially true when consumers lack opportunity to review, let alone negotiate, advance copies of companies' contracts.[183] Furthermore, consumers' eyes are likely to glaze over attempting to read and decipher companies' terms even when consumers get the opportunity to review advance copies.[184]

Nonetheless, not all companies require arbitration, and some companies offer more consumer-friendly provisions to the extent they comply with the Consumer Due Process Protocol. A few of the contracts reviewed prescribed use of arbitration providers' consumer rules, company payment of some level of arbitration costs, and consumer retention of small claims court access. The research therefore highlighted the following consumer concerns: lack of notice and information about the arbitration process, lack of public information and access to discovery, and lack of class relief to make small claims feasible and ensure enforcement of statutory rights. Although regulations may be warranted in all these areas, this article focuses only on regulatory design to address notice and disclosure concerns.

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181. Indeed, consumers recently launched antitrust claims against the major credit card companies for collusive use of pre-dispute arbitration clauses to quell consumers' access to remedies. *Ross*, 524 F.3d at 223-26 (consumers pursuing antitrust claims against banks for colluding to impose arbitration clauses that harm consumers).

182. *See supra* note 122 and accompanying text (discussing research findings of Mann and Siebeneicher).

183. This contradicts courts' rejections of procedural unconscionability claims based on assumptions that consumers can shop for contract terms. *See supra* notes 57-60 and accompanying text (discussing cases enforcing class action waivers).

184. *See* Becher, *supra* note 71, at 161-78 (discussing how information overload hinders consumers' comprehension of contract terms). Even ostensibly conspicuous wording in all capital letters may dissuade reading. *See* MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 172 (2d ed. 2006) (noting how "headings made up of all capital letters are extremely difficult to read").

B. *Focus Group Research*

Traditional legal research, especially in the area of contracts, tends to disregard qualitative interview or focus group methods. Qualitative and focus group research nonetheless sheds light on realities of law in action and reveals questions ripe for further exploration.[185] Understandings and perceptions matter because they shape individuals' realities and their trust in the market.[186] Negative perceptions of arbitration impact efficiency by breeding costly challenges of arbitration agreements and awards, even in cases where they may not be warranted.[187] My focus group research therefore adds qualitative and organic insight into consumer perceptions and seeks to provide an "in action" or "on the street" peek into consumers' views of contracting and arbitration.

Consumers were randomly recruited to participate in focus group discussions on contracting issues that were held in Denver over two days in November 2006.[188] Despite recruitment in print and online, there were only three small group sessions comprised of mainly Caucasian women. Nonetheless, some men and non-Caucasians also joined the discussions, and the participants as a whole were "typical" in that they had very little arbitration experience. In addition, no formal surveys were conducted, which helped foster comfortable discussions.

Overall, these consumers reported that they felt demoralized and helpless against companies' form contracts and arbitration clauses.[189] They were pessimistic about companies' contracting practices and arbitration programs, and they generally distrusted merchant sellers of goods and services.[190] Many reported instances when they were stuck with extra charges or unpleasantly surprised

185. *See* Stewart Macaulay, A New Legal Realism: Elegant Models and the Messy Law in Action, Presentation at University of Colorado Law School (Apr. 18, 2008) (on file with author).

186. *See id.* at 6-7 (also discussing and citing work of Professors William Thomas and Dorothy Thomas acknowledging this longstanding truism).

187. *See* Gross & Black #1118430, *supra* note 97, at 7-9 (highlighting why subjective perceptions of arbitration matter regardless of whether they reflect factual reality).

188. *See* Amy J. Schmitz, Notes, Consumer Focus Group, in Denver, Colo. (Nov. 18, 2006) (unpublished notes, on file with author). Schmitz recruited consumers by offering $25 to participate in the discussions and placing announcements in newspapers and on Craigslist and other such online sources. The research was done with the approval of the University of Colorado Human Research Council (HRC) after completion of the application and training processes.

189. *Id.*

190. *Id.*

with consequences of form contract terms they believed companies imposed through indecipherable fine print or post-contract changes.[191]

Consumers in the discussions also reported that they regularly throw out "bill stuffers" with terms companies add to consumer contracts, and they often bypass "terms and conditions" links in e-contracts they enter into over the Internet.[192] One consumer explained, "I'm just scroll, scroll, scroll, accept."[193] Consumers said they feel it is a waste of time to read or retain any copies of form contracts because they have no choice but to accept them.[194] One consumer recounted her "nerve-wracking" trip to the dentist in which she unsuccessfully tried to contest terms given to her right before her dental procedure, leaving her to simply hope that the dentist was competent.[195]

Some of the consumers nonetheless reported a sense of freedom from their ability to "shop around" even if they cannot effectuate changes in companies' form contracts. One consumer explained her belief that "the nice thing about competition is that if you don't like the contract you can just move on."[196] However, she also believed that competition did not give her leverage to negotiate changes in form contracts "just because they're done like in a corporate setting and they trickle down to the actual retail stores."[197]

Consumers indicated that they have little to no understanding regarding arbitration. They generally said that they merely assumed arbitration clauses must be something companies slip into their contracts to consumers' disadvantage.[198] When asked about noticing arbitration clauses, one consumer relayed her feeling that such clauses are likely in the "same stuff" she "usually just scan[s] through" but "know[s] she should probably read."[199] Another consumer had noticed arbitration clauses in form contracts and assumed that arbitration was "supposed to be unbiased" but really the arbitrator would be

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191. *See* Amy J. Schmitz, Transcripts, Consumer Focus Group, in Denver, Colo. (Nov. 17-18, 2006) (unpublished transcripts, on file with author). For example, one consumer told a story about a magazine she unknowingly became liable for when signing up for a credit card years earlier.

192. *Id.*

193. *Id.*

194. *Id. See also* Schmitz, Notes, *supra* note 188.

195. Schmitz, Transcripts, *supra* note 191 (further explaining that her uncle had recommended the dentist to her, which helped her trust his competence).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

"on [the company's] side" and "act like they are listening and say the compan[y is] right and move on down the road."[200] Fellow group participants echoed beliefs that companies use such terms to "cover their own butts."[201]

These negative perceptions of arbitration also impacted consumers' reported preferences for court versus arbitration. When asked, "What do you think about going to arbitration versus going to court?" one consumer responded: "I think I'd prefer court, I know that seems weird but, because to me I would feel like I have a better chance."[202] The consumer explained: "It goes back to the thing where I don't necessarily think that the arbitrator would be unbiased. Even though they may say it, I don't know, I'm just not a very trusting person sometimes <chuckles>."[203] The consumer nonetheless said she might prefer arbitration if administered by the Better Business Bureau because "they are, not necessarily on my side, but at least 50% on my side."[204]

Another consumer who taught in an inner-city school opined that students like hers who feel they can only settle disputes through violence evidence "the less powerful people in society and they don't wait around for an arbitrator."[205] The consumer explained that even with contract or purchase disputes, consumers feel: "Hey, I ain't gonna win no matter what. It's just a matter of luck if I can get through this transaction and not get screwed."[206] She concluded that this feeling was typical since most consumers are "at middle and below."[207]

At the same time, consumers in the focus groups indicated that they often prefer to discuss complaints and claims in person with a manager or other company representative, rather than through letters or e-mails. They felt they would get a more satisfying resolution through personal dealings.[208] However, consumers also reported great difficulties even contacting company representatives by telephone or e-mail to negotiate terms or resolve complaints.[209] This was especially true when purchasing goods or services via the Internet.[210]

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200. *Id.*
201. *Id.*
202. *Id.* (first asking if the arbitration clause precludes litigation and seeming upset that it would).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

They also recounted instances in which salespersons told them that form terms were not subject to any alteration, or that the salespersons lacked power to change company terms.[211]

Again, this was fairly limited focus group research. The discussions nonetheless helped paint the consumer contracting picture with respect to arbitration clauses and indicated a common lack of understanding regarding arbitration. The discussions also supported evidence of consumers' negative perceptions of form contracts and companies' use of arbitration clauses, and indicated that consumers expect arbitration to be biased even if they are unsure what it entails.

The research again highlights a need for consumer notice and education regarding arbitration clauses.[212] It also raises questions regarding companies' lack of connection with or accountability to consumers, which escalates the likelihood of conflict and the inefficiencies it breeds. This casts doubts on efficiency theorists' contentions that consumers will use their power to regulate corporate conduct, especially when consumers lack power to reach company representatives or are so disillusioned that they no longer try. Disillusionment coupled with contracting inertia also stymies consumers' impetus to rectify their past contracting mistakes.[213] Disclosure and education regarding arbitration may help address these problems by empowering consumers to avoid or negotiate arbitration clauses, or to employ them to their advantage to obtain remedies.

C. *Online Survey Background and Findings*

The above research provided initial insights into consumer contracting, especially with respect to arbitration clauses. However, it lacked the scope and depth that survey research can provide. I therefore developed a survey for administration over the Internet that was unique from other surveys in that it did not focus on simply purchasing practices or preferences, or satisfaction with arbitration proceedings. It went beyond these questions to explore what I call "contracting culture."[214] The online or "e" survey explored attention,

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211. *Id. See also* Schmitz, Notes, *supra* note 188.

212. Consumers' assumptions of arbitrator bias also seem to confirm repeat-player bias, at least to the extent that it has become a reality to consumers regardless of whether they have actual experience with arbitration or even understand what it entails. *See supra* notes 139-47 and accompanying text (discussing repeat-player concerns and research regarding investors' perceptions of biased NASD arbitrators).

213. *See supra* notes 74-90 and accompanying text (discussing various theories and assumptions including contracting inertia and assumptions that consumers rectify contracting mistakes).

214. *See* Schmitz, *supra* note 92, at 123-27 (introducing this concept and analysis).

perceptions, understandings, and negotiation of form contracts with respect to a broad spectrum of contract terms, including arbitration clauses. This article focuses only on questions and response data from the survey regarding arbitration clauses.[215]

1. *Research Design and Implementation*

After extensive research, editing, and testing, a roughly twenty-minute survey consisting of four main sections was created, coded, uploaded, and administered with the assistance of the Institute for Behavioral Science ("IBS") at the University of Colorado.[216] It was then sent over the Internet to a total of 1,100 participants on Survey Sampling International's ("SSI") panel of Colorado consumers over 18 years of age, and it ultimately reaped a research sample of 306 completed surveys from Colorado residents ages 18-88.[217] Roughly one-third of the respondents were male and two-thirds were female.[218]

215. Future reports and publications will discuss the broader data.

216. *See* Amy J. Schmitz, Consumer Survey (Dec. 2007) (unpublished survey, on file with author). Creation of the survey took some time with the planning and design research, followed by editing and testing survey drafts in order to cure ambiguities and errors and to uncover additional research queries and hypotheses. For example, this involved several rounds of drafting surveys and administering them to students, colleagues, and other volunteers to gather feedback and gauge ambiguities revealed through inappropriate or inconsistent responses. I thank Michelle Walker for her invaluable assistance with this process.

217. Use of the SSI panel ensured confidentiality and full approval for conducting the survey from the Human Research Council at the University of Colorado. In addition, the survey first was sent to 8,000 Colorado residents over 18 in SSI's research panel between October 22 and 25, 2007, from which 8% responded. The responses were then coded and correlated with the demographic information SSI had previously gathered for the respondents through their assigned identifying numbers/codes. We then dropped from our sample any responses that were not complete (i.e., the individual did not complete all pages of the survey), were completed in six minutes or less (an unreasonably short time for this survey), skipped many or essential questions, "flat-lined" responses (indicating lack of attention or accuracy), provided nonsensical answers, or otherwise "cheated" in some way. We also checked the sample for overall demographic balance and found underrepresentation of younger men. Accordingly, we sent out between November 8 and November 13 an additional 2,000 invitations to males 18-49 (from which we received a response rate of 2.5%), 1,000 reminders to previously invited males 18-29 (from which we received a response rate of 1.5%), and 1,000 invitations to males 50+ (from which we received a response rate of 14%). We then again dropped apparent "cheaters" using the same methodology we used for the first group of responses, and we sent out additional reminders to males 18-45 in order to fill out a sample of 300 Colorado consumers that was fairly balanced with the Colorado census information we obtained from the U.S. Census Bureau. The process of gathering and checking responses took over a month and allowed us to arrive at what we believe is a solid sample.

218. Schmitz, Consumer Survey, *supra* note 216. Despite attempts to gather more male responses, we learned that women are much more receptive to answering online surveys.

About half of these respondents were married, 7.5% lived with domestic partners, and the remaining respondents were single, separated, or widowed.[219] Three quarters of the sample identified themselves as Caucasian or white, 10% as African American or black, Hispanic or Latino, Asian, American Indian or Alaska Native, or multiple races, and the remaining respondents did not identify a racial category.[220] The respondents had varying levels of education, with 43% earning Bachelor's or post-graduate degrees, 44% some college but no degree, and the rest having a high school diploma or less. Forty-two percent reported full-time employment, 16% reported part-time jobs, and the rest reported no employment outside the home.[221]

2. *Insights into Consumer Arbitration*

Although the survey asked questions about consumers' contracting behaviors and perceptions in general, it also included specific inquiries regarding arbitration and dispute resolution. Specifically, the survey asked consumers if they read dispute resolution or arbitration terms. It also included arbitration or dispute resolution terms among the list of terms in questions asking what, if any, terms consumers have sought to negotiate or change. Furthermore, the survey asked consumers to rank terms, including arbitration and dispute resolution terms, on scales regarding perceived "fairness" and "importance." The survey also asked consumers whether they have noticed arbitration clauses in their contracts.[222]

Roughly three-quarters of the survey respondents reported that arbitration terms are "very" or "somewhat" important with respect to their consumer purchases of personal or household products and services.[223] However, only 39.6% of these chose "very important," while the percentages of respondents that chose "very important" were much higher with respect to price (83.2%), warranties (77.9%), fees and penalties (72%), credit payment (74.7%), returns (66.6%), and

219. Schmitz, Consumer Survey, *supra* note 216, Demographic Information (see *infra* Appendix A).

220. *Id.*

221. Many did not identify themselves with respect to occupation. Of the 82% of those that reported income, roughly 30% were under $29,999, 30% $30,000-49,000, 19% $50,000-$74,999, 9.6% $75,000-$99,999, and 11.2% over $100,000. *Id.*

222. *See* Schmitz, Consumer Survey, *supra* note 216, Section II, Question 7 (see *infra* Appendix B).

223. The question asked: "Think generally about the times when you have looked at contract terms at any point with respect to your purchases of products or services. Were any of the terms important to you? Indicate how you generally view the importance of the following types of terms." *Id.* Respondents could indicate "very important," "somewhat important," "of minor importance," or "not important at all." *Id.*

cancelling services (67.7%). Still, the percentage for arbitration terms was not that far from that for disclaimers/waivers of liability (48.4%) and was above that for freebies and incentives (27.1%).[224]

Survey respondents also were asked to "think broadly about how fair (using [their] own sense of 'fairness') [they] view different contracts and purchase terms, regardless of whether [they] have relevant personal experiences."[225] The question then listed types of contracts and allowed respondents to rank these contracts according to the following: "completely fair," "usually fair," "neutral/not fair or unfair," "usually unfair," or "completely unfair."[226] "Dispute or claim settlement agreements" was among the types of contracts listed, along with contracts ranging from gym memberships and standard forms to apartment leases and contracts with friends.[227]

When it came to dispute or settlement agreements, 32.7% replied "completely" or "usually" fair, 44.6% were "neutral," and the remainder said "usually" or "completely" unfair.[228] Respondents replied "usually" or "completely" fair at much higher rates regarding nearly all of the other types of contracts, including warranties (62%), car sales (57.4%), employment terms (68.5%), and company's standard form contracts (57.9%). Only gym memberships generated more negative responses, with 31% reporting completely or usually unfair.[229] This indicated that consumers are quite skeptical of dispute settlement agreements, although these agreements may be viewed differently than simple arbitration clauses.

At the same time, consumers' reported perceptions are clouded regarding arbitration to the extent that roughly half of the respondents also said that they had not "seen or noticed anything about 'arbitration' in any consumer purchase contract or terms" when buying

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224. Responses of men and women were roughly the same with respect to the importance of arbitration. *See* Schmitz, Consumer Survey, *supra* note 216, Section II, Question 7, By Gender (see *infra* Appendix C).

225. *See* Schmitz, Consumer Survey, *supra* note 216, Section II, Question 8 (see *infra* Appendix D).

226. *Id.*

227. *Id.* The other types of contracts were: health club or gym membership contracts, company's standard form contracts or purchase terms, employment contracts and handbooks, loan contracts, apartment leases, car sales contracts, credit card terms, Internet purchase terms, warranties, cellular phone service contracts, contracts with friends, and contracts with family members.

228. *Id.*

229. *Id.* The percentages reporting usually or completely fair with respect to the remaining contracts listed were as follows: loan contracts (52.5%), apartment leases (51.3%), credit card terms (39.1%), Internet purchase terms (44.6%), cell phone contracts (37.2%), contracts with friends (40%), and contracts with family (41.2%).

consumer goods or services.[230] In addition, only 11.4% reported that they found arbitration or other private dispute resolution terms "important at some point with respect to a complaint or dispute."[231] Nonetheless, consumers did not report that they found many terms important with respect to later contract complaints. The only terms many found important were warranties (56.9% said "yes"), returns (50% said "yes"), and cancelling services (46.7% said "yes").[232]

In addition, respondents indicated that they are not proactive in negotiating or changing form contract terms with respect to consumer purchases: 71.3% of female and 53.4% of male respondents reported that they "never" or "rarely" "try to negotiate or change such form contracts or terms."[233] In addition, only seven (4.4%) of those that had ever successfully changed contracts reported changing arbitration terms.[234] Respondents who had negotiated nonetheless indicated that they had changed terms at much higher percentages with respect to price (70.3%), warranties (25.9%), fees (38.6%), interest rates for credit payment (29.1%), returns (25.3%), cancelling service (20.3%), incentives (22.8%), and disclaimers/waivers of liability (10.8%).[235] However, these findings are again clouded by consumers' lack of familiarity with or attention to arbitration generally. It is therefore not surprising that they would not take time or resources to negotiate arbitration terms.

Overall, this response data seems to comport with research findings discussed above indicating that consumers generally care more

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230. Schmitz, Consumer Survey, *supra* note 216, Section III, Question 7 (see *infra* Appendices E and F). Specifically, 52.5% of the female respondents and 46.5% of the male respondents responded "no" to the question of whether they "[h]ad seen or noticed anything about 'arbitration' in any consumer purchase contract or terms." *Id.*

231. Schmitz, Consumer Survey, *supra* note 216, Section III, Question 6 (see *infra* Appendix G). The question asked: "Now think generally about any complaints or disputes you have had regarding consumer purchases of products or services. What, if any, terms have you found to be important at some point with respect to a complaint or dispute? Check ALL that apply." This was followed by a list of terms, including those for price, warranties, fees and other penalties, returning items, cancelling services, "freebies" or incentives, and "Other" – or "N/A; I have never had a claim or dispute." *Id.*

232. With respect to the other terms, respondents answered "yes" to importance in percentages as follows: price (19.9%), fees/penalties (37.3%), interest rate/credit payment (21.6%), freebies/incentives (8.8%), and disclaimers/waivers (17.6%). *Id.*

233. Schmitz, Consumer Survey, *supra* note 216, Section III, Question 1, By Gender (see *infra* Appendix H).

234. Schmitz, Consumer Survey, *supra* note 216, Section III, Question 1b (see *infra* Appendix I).

235. *Id.*

about price- and quality-related contract terms than what they consider less salient provisions, such as those regarding arbitration and "freebies" or incentives.[236] However, it is unclear whether consumers truly understand the impact of arbitration provisions. Consumers may be more attentive to arbitration terms if they know how these terms may curtail their warranty and other remedy rights.

For example, the majority of respondents indicated through their responses to a scenario question that they would like a salesperson to explain arbitration terms to them in making a consumer purchase. Specifically, respondents were asked to imagine they had chosen a car they wished to purchase and were given a five-page contract to sign to finalize the deal. They were then provided a list of purchase terms and asked to "check all the terms that [they] would want the salesperson to explain."[237] The results were that 57.1% of female and 53.4% of male respondents (55.9% overall) checked that they would want terms requiring that they "resolve claims through private means such as 'arbitration' instead of 'bringing claims to court'" explained to them.[238] This was a higher overall rate than that for incentives (48.7%) and general boilerplate (41.5%), and not far below that for technical/legal words (60.1%). Nonetheless, respondents said they desired explanation at higher percentages with respect to price (72.5%), warranties (92.2%), fees/penalties (84%), interest rate for payment (75.2%), returns (76.1%), and disclaimers (75.2%).[239] It is not surprising that consumers who do not notice arbitration clauses would be less interested in explanation of these clauses than the terms that already pique their attention.

Of course, this research is limited in scope. However, it provides a view into consumers' contracting regarding arbitration clauses.[240] The results indicate some negative perceptions of arbitration clauses,

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236. *See supra* notes 98-113 and accompanying text (discussing others' findings that consumers focus on price-related and other "salient" terms).

237. Schmitz, Consumer Survey, *supra* note 216, Section III, Question 3 (see *infra* Appendices J and K).

238. *Id.*

239. *Id.*

240. As with any survey research, it is subject to interpretation differences as well as perception and other cognitive biases. People read and interpret questions differently, regardless of how "clear" or sanitized the questions are. Furthermore, people have a natural propensity to believe that their views are the "normal" views even when they are not. *See* Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1278-1300 (2008) (explaining false consensus bias and how it applies in contract interpretation contexts).

coupled with lack of attention or understanding regarding arbitration. This creates a somewhat circular contracting dynamic.[241] Consumers do not pay attention to arbitration clauses, which leaves companies free to skew arbitration provisions to their own advantage without consumers even noticing. At the same time, consumers may distrust arbitration clauses due in part to their lack of understanding or experience with respect to arbitration. These negative assumptions then fuel a sense of helplessness that may perpetuate this cycle by further dissuading consumers from reading or negotiating arbitration clauses. Conspicuous and informative arbitration disclosures may help address this dynamic by making arbitration more accessible and helping consumers understand how they can confront or navigate arbitration terms.

V. Policy Implications for Contextual and Empirical Research

Most legislative proposals for arbitration reform, such as the Arbitration Fairness Act ("AFA"), call for an all-out ban on pre-dispute arbitration agreements in certain contexts.[242] These proposals may be overbroad and misguided, however, because they rarely address the salient contextual and empirical research regarding consumers' contracting behavior and understanding of arbitration.[243] Furthermore, this research is vital for prescribing arbitration disclosures, which this article focuses on as a fairly uncontroversial first step in regulating arbitration. Disclosures will nonetheless have little value unless they account for consumers' contracting behavior, awareness, and understanding with respect to arbitration clauses.

241. *See supra* notes 65-93 and accompanying text (discussing theories regarding consumer contracting behavior).

242. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). *See also* Note, *Recent Developments – Access to Courts, Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration,* 122 Harv. L. Rev. 1151, 1170-81 (2009) [hereinafter *Access to Courts*] (discussing the Act and critiquing its blanket approach).

243. *See* Bar-Gill, *supra* note 17, at 31-32 (emphasizing how "[l]egal intervention should be based on robust evidence of consumer mistakes leading to substantial welfare costs" and that the evidence should be market-specific).

A. *Contextual Considerations for Arbitration Reforms*

The recently reintroduced AFA is indicative of the legislative proposals that broadly bar pre-dispute arbitration clauses in traditionally uneven bargaining contexts; the AFA targets the employment, consumer, franchise, and civil rights areas.[244] The AFA also reverses the "separability" rule by requiring courts to consider all issues going to the arbitration clause and/or the contract as a whole.[245] Although the Act has died in committee in the past, it may have new life with recent political changes in Congress and increasing stories of arbitration abuse.[246]

As in the past, the Act is proposed based on a rote list of "findings" that includes statements that "most" consumers have no choice but to accept arbitration clauses in their purchases, arbitration undermines public law, and the process gives companies "near complete freedom to ignore the law and even their own rules."[247] The findings also state that arbitration providers "are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business" and lament that courts uphold "egregiously unfair mandatory arbitration clauses."[248]

Research does confirm that some companies have used pre-dispute arbitration clauses in non-negotiable form contracts to their unfair advantage.[249] My and others' studies have shown that in certain

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244. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

245. *Id. See also supra* note 44 and accompanying text (briefly explaining this rule and citing relevant authorities).

246. This bill has been proposed in the past but has had little success. *See, e.g.*, Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (2007) (primarily sponsored by Sen. Russ Feingold (D-Wis.) and Rep. Hank Johnson (D-Ga.) but never passed); H.R. 3651, 109th Cong. (2005) (failed bill to amend the FAA to preclude arbitration of employment disputes unless the employee and employer agree to arbitrate after the dispute arises); H.R. 2969, 109th Cong. (2005) (another bill lost in committee to preclude enforcement of pre-dispute arbitration agreements in employment contracts). However, Rep. Johnson recently reintroduced the bill in the House of Representatives with more than 35 co-sponsors. Rep. Johnson Seeks to Strengthen Consumer, Employee Rights, Feb. 12, 2009, http://www.house.gov/apps/list/press/ga04_johnson/2009_02_12_arbitration_fairness_drops.html (noting optimism for passage of the bill due to momentum and 35 original cosponsors). Campaigns for its passage have begun. *See, e.g.*, Pete Mackey, The Arbitration Fairness Act of 2009 – Get Behind It, Feb. 10, 2009, http://mobile.injuryboard.com/miscellaneous/the-arbitration-fairness-act-of-2009-get-behind-it.aspx.

247. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (stating findings in Section 2).

248. *Id.*

249. *See supra* notes 117-33 and accompanying text (describing the limited research regarding companies' use of arbitration clauses).

areas such as credit card and wireless service contracts, many companies often preclude class proceedings and effectively lead consumers to forego legal rights or bear the high costs of individual arbitration proceedings.[250] Furthermore, many courts uphold arbitration clauses with suspect procedural terms under the pro-enforcement gloss of the FAA.[251] As the AFA findings suggest, policymakers and consumers have negative perceptions of form contracts and arbitration.

It is nonetheless debatable whether the Act's findings and consumer negativity regarding arbitration are entirely warranted. Many consumer arbitration agreements are reasonable and may benefit both companies and consumers.[252] In addition, there is evidence that consumers often are more likely to get some recovery in arbitration over litigation and have been satisfied with arbitration proceedings overall.[253] It may be unwarranted to assume that the fairly large pool of arbitrators competing for clients would risk looking incompetent and losing business by ignoring proper legal and equitable rules.[254]

Moreover, many arbitration providers promulgate consumer-friendly rules, and there is evidence that many companies voluntarily comply with those rules or do so under the urgings of the AAA or other arbitration providers.[255] The AAA reports that it will not administer arbitration proceedings in accordance with clauses requiring

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250. *See supra* notes 128-31 and accompanying text (discussing studies comparing companies' use of arbitration clauses in consumer versus non-consumer contracts); *see also In re* Am. Express Merchs.' Litig., 554 F.3d 300, 300-09 (2d. Cir. 2009) (holding that a ban on class-wide arbitration in credit card agreements was unenforceable because it would effectively insulate American Express from antitrust liability by cutting off consumers' only meaningful access to recovery).

251. *See supra* notes 36-64 and accompanying text (describing courts' treatment of arbitration clauses).

252. *See supra* Part IV.A (discussing fair arbitration terms in some of the contracts gathered).

253. *See supra* notes 134-38 and accompanying text (discussing studies indicating favorable results for consumers who arbitrate their claims).

254. *See* Bruce L. Benson, *The Spontaneous Evolution of Cyber Law: Norms, Property Rights, Contracting, Dispute Resolution and Enforcement Without the State*, 1 J.L. ECON. & POL'Y 269, 287 (2005) (noting arbitrators' incentives for remaining neutral and properly applying relevant rules and norms in order to garner respect, generate business, and be successful); Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 105-106 (2000) ("The competition among arbitrators gives them different incentives than public court judges, who generally do not compete to attract litigation.").

255. John Flynn Rooney, *Study Finds that Arbitration Process Yields Benefits*, CHI. DAILY L. BULL., Mar. 13, 2009, at 1 (reporting a study finding that 98.2% of the

consumers to pay all arbitration costs and fees.[256] At the same time, post-dispute arbitration agreements are rare in consumer cases and companies cannot rely on or pass along cost-savings based on hopes consumers will agree to arbitrate after claims develop.[257] It therefore would be imprudent to bar pre-dispute arbitration clauses in all consumer cases.

Some companies' problematic use of arbitration still provides reason for consumers' and AFA supporters' negativity. Clear regulation may help clarify uncertain case law, which has failed to provide sufficient guidance for companies drafting arbitration clauses and consumers seeking to challenge those clauses.[258] Furthermore, technological complexities of e-contracting and their increasing inclusion of arbitration clauses add to the uncertainty and resulting litigation.[259] At the same time, most arbitration policy discussions are flawed to the extent that they ignore empirical research, and instead hinge on interested parties' advocacy for their positions based on solicited stories and testimonials.[260] For example, the "findings" in the AFA appear to be based on little more than position statements

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consumer arbitration clauses that came before the AAA during the study period complied with their consumer protocols or the AAA took appropriate corrective action).

256. *See* Am. Arbitration Ass'n, AAA Review of Consumer Clauses, http://www.adr.org/si.asp?id=4453 (last visited Feb. 27, 2008) (stating the AAA's refusal to administer arbitration proceedings pursuant to consumer clauses that do not comply with their due process protocol).

257. Others have argued that the AFA approach of barring enforcement of pre-dispute arbitration clauses in broad and ill-defined categories was both over- and under-inclusive, and that it may be more beneficial to legislate procedural reforms. *See, e.g.*, *Recent Proposed Legislation, Arbitration – Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees – Arbitration Fairness Act of 2007, § 1782, 110th Cong. (2007)*, 121 HARV. L. REV. 2262, 2267-68 (2008) (critiquing the Act's broad scope and approach); *Access to Courts*, *supra* note 242, at 1175-77 (explaining how banning pre-dispute arbitration agreements prevents cost-reducing effects of pre-dispute arbitration clauses and will decrease both companies' and consumers' abilities to vindicate their rights).

258. *See* Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 978-83 (2005) (noting how especially with respect to arbitration clauses, courts have varied widely in their approaches and responses, resulting in uncertainty and inefficiency).

259. *Id.* (highlighting how courts struggle with emerging acceptance and enforcement issues regarding e-contracts and lack resources to address underlying technological issues).

260. *See id.* at 1008-10 (explaining why consumer interest group leaders advocate for flat prohibitions on arbitration clauses based on testimony of those that have suffered most, even when consumers as a whole may benefit from these clauses and would be better served by a more balanced approach); Bar-Gill, *supra* note 17, at 31-32 (discussing need for context-specific research in designing regulations).

and featured testimony by advocacy groups and arbitration commentators.[261] It is difficult to decipher what Congress even considers due to the volume of press releases and advocacy statements added to the Congressional Record.[262] It appears that any studies Congress may have considered were limited, inconclusive, or fairly uninformative with respect to how reforms should be designed to capture the most "bang for the buck."[263]

Reforms should aim to address the real problems with consumer arbitration, as well as their likely impacts on company and court costs. Federal and state judicial budgets are tight, and the AFA may increase courts' loads. Courts may not have resources to handle additional consumer, employment, and franchise cases that would no longer be arbitrated in the wake of the AFA's passage. Companies facing significant shortfalls and possible bankruptcies also may not have the wherewithal to shoulder increased dispute resolution costs. Moreover, regardless of one's lack of sympathy for these companies, policymakers must consider the impacts of company costs and cutbacks on their prices, quality of goods/services, employees, and stockholders.

Arbitration regulations should therefore seek to promote procedural fairness through protections aimed to be most cost-effective. This is a tall order: it is difficult to know what impact any regulations will have until after they have been tested. However, consideration of empirical research can aid policymakers in crafting regulations that are at least more likely to serve fairness and efficiency interests than those based solely on theory and assumptions.[264] This research should include not only studies of gathered contract terms and arbitration outcomes, but also studies of consumers' contracting awareness, understandings, and behaviors.

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261. *See, e.g.*, William B.L. Little, *Fairness is in the Eyes of the Beholder*, 60 BAYLOR L. REV. 73, 146-51 (2008) (discussing the 2007 Act's broad "findings," how the Act's sweeping scope would impact securities arbitration, and the politics surrounding its consideration); *see also* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (incorporating identical findings).

262. *See* Little, *supra* note 261, at 146-51 (discussing the various statements and press releases pro- and anti-arbitration forces added to the record).

263. *Id.* (noting the limited and possibly skewed studies presented to the Congressional subcommittee considering the Act regarding securities arbitration alone). *See also* Gillette, *supra* note 258, at 1008-10 (noting how advocates sometimes skew their reports to suit their positions).

264. *See* Bar-Gill, *supra* note 17, at 31-32, 35-38 (highlighting the need for contextual research in regulating contracts).

B. *Arbitration Disclosures Tailored for Consumers' Contract Behavior*

Deep empirical evidence should be considered in crafting a wide spectrum of arbitration reforms. This may include varied procedural regulations such as those I have proposed in the past for requiring companies to comply with the 1998 Consumer Due Process Protocol, which calls for clear notice of arbitration clauses, provision of information regarding the arbitration process, preservation of consumers' access to small claims court, limits on consumer costs, and convenient hearing locations.[265] Nonetheless, this article focuses only on the design of arbitration disclosure regulations. This is because such disclosures are fairly inexpensive and enhance contractual assent instead of curtailing freedom of contract.[266] Disclosures are also less controversial than substantive limits: commentators and policymakers with different political and theoretical viewpoints generally support disclosures.[267]

Consideration of contracting behavior research is fundamental in crafting disclosure rules because those rules' impact is directly tied to whether consumers will read, understand, and utilize any required disclosures. In the mortgage context, for example, commentators have argued that more behavioral research is necessary in prescribing disclosure reforms that account for consumers' contracting biases and behaviors.[268] Disclosures are not worth their costs if they fail to help consumers shop for goods and services.[269] Furthermore, policymakers must consider whether consumers' biases may cause them to

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265. Nat'l Consumer Disputes Advisory Comm., Am. Arbitration Ass'n, Consumer Due Process Protocol, http://www.adr.org/sp.asp?id=22019 (last visited Feb. 15, 2010). Again, procedural protections beyond disclosure may be warranted. However, full discussion of such protections has been discussed elsewhere and is beyond the scope of this paper. *See, e.g.*, Schmitz, *Warranty Woes*, *supra* note 9, at 661-86 (discussing additional reforms and regulations for consumer arbitration); Schmitz, *Deference*, *supra* note 9, at 37-57 (proposing procedural reforms in lieu of a wholesale ban on enforcement of pre-dispute arbitration agreements in consumer contracts).

266. *See* Hillman, *supra* note 96, at 838-39, 846-48 (discussing the low cost of disclosure and compliance with Llewellyn's assent theory underlying U.C.C. Article 2).

267. *See* Bar-Gill, *supra* note 17, at 31-32, 35-38 (noting how economic and behavioral scholars generally support disclosures but disagree on the scope of such intervention in contracts).

268. Michael S. Barr et al., Behaviorally Informed Home Mortgage Regulation 6-12 (Apr. 15, 2008) (unpublished manuscript, *available at* SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121199) (arguing for more consideration of consumers' psychology in crafting reforms).

269. *Id.* at 7-10.

contract in economically "irrational" ways regardless of whether they read the disclosures.[270]

Similarly, mandatory notice provisions for arbitration clauses will have little impact if consumers do not read or understand them. This is a valid concern in light of the consumers' responses in my study indicating a general lack of attention to, or experience with, arbitration clauses. Nearly ninety percent of the respondents reported that they did not see arbitration terms as important although these terms are often central in claims resolution.[271] In addition, despite respondents' reported distrust of dispute settlement terms, very few of the respondents indicated that they had negotiated or changed contract terms pertaining to arbitration or dispute resolution.[272]

Other research similarly suggests that most consumers do not read their contracts in general, and even consumers who read salient terms may be dissuaded from reading arbitration provisions.[273] Consumers' contracting inertia, irrational optimism regarding the likelihood of future claims, and feelings of powerlessness may prevent them from questioning or negotiating arbitration clauses even if they are well-disclosed.[274] Regulations may have little impact if companies can ostensibly comply with disclosure rules but use inexpensive strategies to shroud the disclosures.[275]

Poorly designed mandatory disclosures may therefore increase companies' contracting costs without providing real consumer protection benefits. Companies faced with new regulations would likely incur costs engaging counsel to provide legal advice regarding the new rules. They also may incur costs implementing revised contracts and perhaps adjusting on-line and paper contract delivery to ensure compliance. In addition, although such regulations may claim to clarify enforceability requirements for arbitration clauses, they may nonetheless backfire by fueling litigation regarding their interpretation and application.

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270. *Id.*

271. *See supra* notes 216-41 and accompanying text (explaining results from my survey).

272. *See supra* notes 188-211, 233-35 and accompanying text (discussing findings from my empirical studies).

273. *See supra* notes 84-90 and accompanying text (highlighting studies indicating signaling power of contracts and the effects of information overload on consumers' propensity to read and give proper weight to e-contracts loaded with form terms).

274. *See supra* notes 81-83 and accompanying text (noting power issues in company/consumer relations).

275. *See* Hillman, *supra* note 96, at 842-44 (discussing why consumers do not read contracts).

That is not to say that policymakers should not prescribe arbitration disclosure rules. Carefully tailored regulations would be worth their costs to address consumers' lack of attention and education regarding arbitration clauses and some companies' harsh use of arbitration to effectively evade consumer liability. It is not surprising that consumers who lack knowledge, experience, and power with respect to arbitration do not read or seek to change arbitration terms.[276] Most consumers in my study reported that they had not noticed arbitration clauses in their contracts, although they are likely subject to these clauses in their credit card and wireless service contracts.[277] Notice must therefore be coupled with information about arbitration's impact in order to raise consumers' interest in arbitration clauses and awareness regarding the clauses' preclusion of class actions.[278] The majority of respondents in my study who said they would want a salesperson to explain arbitration terms in a car purchase would likely be even higher if those respondents understood the terms' impact on their rights.[279]

At the same time, evidence that companies include arbitration clauses and class relief waivers in their consumer contracts, but not in their other business agreements, raises questions regarding claims that companies simply use arbitration as a superior method for resolving their disputes.[280] Instead, this evidence suggests that companies strategically use arbitration clauses to cut off class claims and thereby limit or preclude consumer recovery.[281] This was an aspect of arbitration clauses participants in my focus groups did not realize but were eager to learn more about.[282]

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276. *See supra* notes 188-211, 233-35 and accompanying text (providing findings from my study).

277. *See supra* notes 230-31 and accompanying text (discussing findings from my e-survey regarding lack of notice regarding arbitration clauses and my analysis of contracts in these consumer contexts).

278. *See supra* note 15 and accompanying text (discussing Eisenberg et al.'s research regarding arbitration clauses and class waivers in consumer contracts). Courts also voice concerns with harsh use of class arbitration waivers. *See In re* Am. Express Merchs.' Litig., 554 F.3d 300, 300-309 (2d Cir. 2009) (refusing to enforce a ban on class-wide arbitration in credit card agreements).

279. *See supra* notes 217-241 and accompanying text (providing results of my e-survey); *see also supra* notes 202-04 and accompanying text (discussing focus group discussions in which consumers were surprised and concerned regarding arbitration clauses' impact on their rights to go to court).

280. *See supra* notes 127-31 and accompanying text (exploring research indicating companies' strategic use of arbitration clauses in consumer contracts).

281. *Id.*

282. *See supra* notes 202-04 and accompanying text (discussing my focus group research and respondents' surprise to learn that arbitration clauses curtail their rights to go to court).

What does all this mean for arbitration disclosures? First, companies that use arbitration provisions in their consumer contracts should be required to plainly and conspicuously give notice of the provision and its impact on litigation and class proceedings. This must be pursuant to clear disclosure rules that do not invite litigation regarding their meaning and enforcement. In addition, the rules should require companies to follow the notice with information about the required arbitration process in order to ease companies' onerous use of arbitration and consumers' negativity toward the process. The mandatory nature of the rules also should put an end to some companies' unwillingness to provide consumers with pre-purchase copies of their contract terms and the practice of shrouding arbitration clauses in bill stuffers and complicated website links. Accordingly, arbitration disclosure regulations should go beyond prescribing a "reasonableness" standard to specify that companies using arbitration clauses must provide consumers with basic information about how the arbitration process works, its likely costs, how an arbitration clause may curtail class action and jury rights, and whom to contact for filing claims and gathering further information.[283] Nonetheless, the disclosures should not cause information overload. Consumers rationally weigh the value of their time and choose not to read long or convoluted contracts.[284]

Regulations should require conspicuous provision of this arbitration information in a concise and readable format.[285] Specifically, arbitration disclosures could be included in a simple grid similar to the Truth in Lending Act's ("TILA") grid, or "Schumer Box," which lenders must include in their loan agreements to disclose applicable fee and interest information.[286] A few companies already provide arbitration information in such a grid in their form contracts, and others

283. With respect to credit contracts, some have advanced an objective reasonableness standard for disclosures that would require lenders to meaningfully convey necessary information in light of typical consumers' psychological biases. *See* Bar-Gill, *supra* note 17, at 32-44 (further discussing a proposal for a more considered approach for crafting disclosure reforms calculated to have real impact). Vague "reasonableness" standards, however, often raise more questions than they answer. *See* Schmitz, *Warranty Woes*, *supra* note 9, at 628-30 (discussing need for procedural disclosure protections in MMWA consumer arbitration).

284. *See* Becher & Unger-Aviram, *supra* note 12, at 20-21 (discussing their findings supporting other evidence that consumers place great importance on contract length in deciding whether to take time to read their contracts).

285. *Id.* at 20-21 (proposing that regulations should aim to shorten contracts).

286. *See* Bar-Gill, *supra* note 17, at 35-37 (discussing TILA disclosures and the "Schumer Box"); 15 U.S.C.A. § 1604(b) (West 2008) (requiring the Federal Reserve to promulgate model disclosure forms and clauses to facilitate mandatory disclosure in common transactions); 12 C.F.R. pt. 226 app. G-10 (2009) (providing model disclosure

could cheaply incorporate a grid using a legislative model.[287] This would be more noticeable and understandable than the typically long and unreadable arbitration clauses most companies use.[288] It also would be more readable than a paragraph of ostensibly conspicuous disclosures in all bold or capital letters.[289]

At the same time, these disclosures could be posted on a central website to allow for easy comparison. This could dovetail with proposals for broader central disclosure of consumer contract terms and be included on a website that consumers could access to compare companies' terms for common products such as wireless phone service and credit cards.[290] Indeed, there are already Internet sites for consumers to compare general aspects of companies' wireless service options (i.e., plan minutes, area coverage, costs, phones, etc.). These sites also could include companies' arbitration requirements, giving consumers a better opportunity to "shop around" for these contract terms.[291]

Although consumers may not make purchasing decisions based on comparison of arbitration terms per se, central disclosure may at least foster transparency and education regarding the arbitration process. Disclosure would enhance arbitration awareness by signaling its importance, which may prompt consumers to question and

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forms and clauses for common consumer transactions); 15 U.S.C.A. § 1602(u) (West 2008) (defining required disclosures in credit context as the annual percentage rate, method of determining the finance charge and amount of balance upon which the charge will be imposed, amount of the finance charge, the amount to be financed, total of payments, the number and amount of payments, and dates for repayment of indebtedness); 12 C.F.R. pt. 226 app. G-10(A) (2009) (providing model forms for credit card applications and solicitations).

287. For example, administrative regulations set out a sample form for the credit or charge card disclosures issuers must provide under 12 C.F.R. § 226.5a on or with a solicitation or an application to open a credit or charge card account. Model Forms and Clauses, Applications and Solicitations Sample (Credit Cards), 12 C.F.R. pt. 226, App. G-10(B) (2008) (form included a succinct and readable grid format for the disclosures of interest rates and fees). A similar model grid could be used in consumer contracts for disclosing key information regarding the contracts' arbitration requirements. *See* Collected Arbitration Provisions, *supra* note 153 (some contracts included pertinent information in a chart or grid form).

288. *See supra* notes 161-66 and accompanying text (describing the arbitration clauses I encountered in my review of cell phone and credit card contracts).

289. *See* Laura Schocker, *Why do CAPITAL LETTERS So Annoy Us?*, BBC NEWS MAG., Sept. 3, 2009, http://news.bbc.co.uk/2/hi/uk_news/magazine/8234637.stm (discussing some studies indicating that block capitals may be difficult to read and may be considered "shorthand for screaming" when used on-line).

290. *See* Hillman, *supra* note 96, at 846-54 (discussing the pros and cons of mandatory website disclosure of boilerplate terms in companies' e-contracts).

291. *See* Becher & Unger-Aviram, *supra* note 12, at 20-21 (noting options for contract term disclosure on the Internet).

perhaps join together to resist or change overly burdensome arbitration terms or choose to shop elsewhere. In addition, central disclosure may raise "red flags" for regulators and watchdog groups regarding harsh arbitration terms and give sellers incentives to use and publicize more consumer-friendly arbitration procedures.[292] This, in turn, may improve consumer trust in arbitration and form contracts.

Concerns would remain that some companies would decide that they would reap greater benefits from onerous contract terms than from fostering goodwill through disclosure of reasonable terms. Furthermore, even if mandatory website disclosure provides companies with incentives to avoid particularly harsh terms, it may not dissuade them from drafting contracts with possible anti-consumer impacts.[293] Courts also may view companies' compliance with mandatory disclosure rules as reason to provide disclosed contracts with a safe harbor from unconscionablility review. It would be difficult for a consumer to argue that a contract is procedurally unconscionable if the consumer has access to the terms through the companies' or a central website.[294]

Nonetheless, these possible drawbacks to disclosure and central Internet posting are not insurmountable and do not outweigh their potential benefits. Disclosure may foster companies' adoption of reasonable arbitration practices and terms in order to avoid consumer challenges and the gaze of watchdog groups such as Consumers Union that are already vigilant of arbitration clauses.[295] Companies and their attorneys must keep apprised of acceptable arbitration

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292. *Id.* (noting how reputation concerns may prompt contractual fairness). *See also* Hillman, *supra* note 96, at 853-54 (noting how watchdog groups may give companies an incentive to contract fairly, but this incentive may be insufficient to prevent companies from "drafting marginal terms that may not create significant reputational concerns but would harm consumers just the same").

293. *See* Hillman, *supra* note 96, at 854-55.

294. *See, e.g.*, Margae, Inc. v. Clear Link Techs., LLC, No. 2:07-CV-916 TC, 2008 WL 2465450, at *2-4, *6-7 (D. Utah June 16, 2008) (finding that an arbitration clause in amended terms posted on a company's website after the customer clicked "I accept" for the original e-contract was binding on the customer because the customer bore the burden to monitor the company's website for any changes allowed under the original contract).

295. *See, e.g.*, Press Release, *Consumers Union Backs Arbitration Reform Package* (Mar. 11, 2002), *available at* http://www.consumersunion.org/finance/reformwc302.htm (discussing the widely-respected publisher of CONSUMER REPORTS' support for arbitration reforms to address problems with arbitration clauses that curb consumers' access to remedies).

terms, considering that courts compare companies' practices in assessing enforcement of arbitration.[296] In addition, disclosure through a grid breaking down key elements of arbitration proceedings would alert consumers to their importance and make it more difficult for companies to draft marginal terms that may otherwise escape notice through confusing language. Furthermore, although safe harbor effects of disclosure rules may squelch a few valid claims, this would hinder unfounded arbitration challenges and ease the current uncertainties and inefficiencies of these lawsuits.[297]

Policymakers also could augment central posting with an approval system for companies' consumer arbitration clauses.[298] This could be similar to contract approval systems adopted elsewhere. For example, the Israeli Standard Contracts Law encourages sellers to submit their form contract terms to an administrative tribunal for approval. If terms are approved, they are then provided a safe harbor from judicial invalidation.[299] This process encourages reasonable form contracts, although it has received some criticism to the extent its voluntary nature allows companies to choose anti-consumer contracting over pre-approval.[300] Nonetheless, an arbitration term approval system could be mandatory to ensure compliance, and use of the Internet would keep administrative costs to a minimum.

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296. *See, e.g.*, Cicle v. Chase Bank USA, 583 F.3d 549, 554-57 (8th Cir. 2009) (carefully distinguishing an arbitration provision in a credit card agreement from other cases in upholding the provision that included a thirty-day opt-out and small claims carve-out); Harris v. DirectTV Group, Inc., No. 1 07-C-3650, 2008 WL 342973, at *1-3 (N.D. Ill. Feb. 5, 2008) (highlighting how the 2006 arbitration provision at issue provided clearer notice than the unenforceable 1999 provision in upholding the cable company's arbitration clause); Legair v. Circuit City Stores, Inc., 213 Fed. App'x 436, 439 (6th Cir. 2007) (distinguishing this case from other cases holding employment arbitration agreements unconscionable because here, Circuit City's arbitration agreement included an opt-out provision and employees were provided with notice and information about arbitration).

297. *See supra* notes 36-64 and accompanying text (discussing uncertainty and inefficiency of the current case-by-case analysis).

298. *See* Gillette, *supra* note 258, at 983-88 (discussing and analyzing proposals for an administrative disclosure and approval system for form contracts); Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 145-47 (2008) (suggesting need for rules requiring clear notice of contract terms for e-contracts).

299. Gillette, *supra* note 258, at 983-88 (noting the Israeli and European Community examples of such processes).

300. Voluntary systems are less intrusive on contractual liberty, but they are problematic to the extent that companies may find it more profitable to forego the system and continue using harsh terms. *See id.* at 987-89, 1012-13 (highlighting drawbacks of a voluntary approval system, problems of encouraging sellers to use the process, and administrative capture concerns).

These are only some ideas to consider. The key is to continually digest the full panoply of research in designing disclosure reforms, instead of focusing on political bravado and advocacy statements. Disclosures should account for the extent consumers read and understand arbitration clauses, as well as consumers' contracting behaviors and biases. Policymakers can start by considering the current empirical evidence and gathering further research to fill in the gaps.

VI. Conclusion

Consumer advocates call for abolition of pre-dispute arbitration clauses, while industry groups oppose any regulation of contractual freedom. The problem is that policymakers on both sides of the debate stake their positions and design proposed reforms in the dark by clinging to politically-motivated statements and limited studies supporting their views. They rarely consider a full range of behavioral and empirical research necessary for crafting cost-effective regulations. Failure to consider this research is especially problematic with respect to arbitration disclosures. Disclosures are meaningless if consumers do not read or understand them. This article highlights the importance of deep behavioral and empirical research in designing arbitration disclosure rules and considers how rules may be tailored in light of others' and my own empirical studies to provide optimal consumer protection benefits for the attendant costs.

Research confirms behavioral theorists' predictions that consumers generally do not read or negotiate their contracts, and even consumers who skim contracts for provisions they deem salient are unlikely to read arbitration terms due to lack of understanding or experience with arbitration. Arbitration disclosures will therefore have little impact unless they are presented in a manner that signals their importance and provides sufficient information regarding the applicable arbitration process and its impact on consumer rights. Disclosures also must be clear and concise, which could be accomplished using a grid format like the TILA's "Schumer Box." In addition, arbitration provisions could be centrally posted on the Internet in order to foster awareness and comparison shopping, and to incentivize companies' use of consumer-friendly procedures. Nonetheless, these are initial ideas: more empirical research and discussion are necessary to further illuminate optimal regulatory design.

APPENDIX A: DEMOGRAPHIC INFORMATION

Age

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	18-24 yrs old	19	6.2	6.2	6.2
	25-29 yrs old	16	5.2	5.2	11.4
	30-39 yrs old	40	13.1	13.1	24.5
	40-49 yrs old	73	23.9	23.9	48.4
	50-59 yrs old	81	26.5	26.5	74.8
	60-69 yrs old	54	17.6	17.6	92.5
	70 yrs or over	23	7.5	7.5	100.0
Total		306	100.0	100.0	

Annual Household Income

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Less than $20,000	43	14.1	17.1	17.1
	$20,000-$29,999	33	10.8	13.1	30.3
	$30,000-$39,999	43	14.1	17.1	47.4
	$40,000-$49,999	32	10.5	12.7	60.2
	$50,000-$59,999	22	7.2	8.8	68.9
	$60,000-$74,999	26	8.5	10.4	79.3
	$75,000-$99,999	24	7.8	9.6	88.8
	$100,000-$149,999	23	7.5	9.2	98.0
	$150,000+	5	1.6	2.0	100.0
	Total	251	82.0	100.0	
Missing	System	55	18.0		
Total		306	100.0		

Marital Status

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Single, Never Married	58	19.0	19.0	19.0
	Married	150	49.0	49.0	68.0
	Separated/Divorced/Widowed	75	24.5	24.5	92.5
	Domestic Partnership	23	7.5	7.5	100.0
Total		306	100.0	100.0	

Employment Status

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Full-Time	129	42.2	42.2	42.2
	Part-Time	49	16.0	16.0	58.2
	Not Employed	128	41.8	41.8	100.0
Total		306	100.0	100.0	

Education Level

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Some High School	5	1.6	1.6	1.6
	High School Graduate	34	11.1	11.1	12.7
	Some College	135	44.1	44.1	56.9
	College Degree	78	25.5	25.5	82.4
	Some Post-Graduate	17	5.6	5.6	87.9
	Master's Degree	27	8.8	8.8	96.7
	Ph.D./Law/Professional Degree	10	3.3	3.3	100.0
Total		306	100.0	100.0	

Respondent Occupation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Executive/Upper Management	12	3.9	4.5	4.5
	IT/MIS Professional	11	3.6	4.1	8.6
	Doctor/Surgeon	2	.7	.7	9.4
	Educator	11	3.6	4.1	13.5
	Homemaker	33	10.8	12.4	25.8
	Student	13	4.2	4.9	30.7
	None of Above	168	54.9	62.9	93.6
	Small Business Owner	17	5.6	6.4	100.0
	Total	267	87.3	100.0	
Missing	System	39	12.7		
Total		306	100.0		

Racial/Ethnic Identification

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Unspecified	45	14.7	14.7	14.7
	Other	6	2.0	2.0	16.7
	Hispanic	6	2.0	2.0	18.6
	Multi: Hispanic/Other	2	.7	.7	19.3
	Pacific Islander	2	.7	.7	19.9
	Native American/ American Indian	2	.7	.7	20.6
	Multi: Hispanic/Native American/American Indian	1	.3	.3	20.9
	Asian	3	1.0	1.0	21.9
	Black	2	.7	.7	22.5
	White	228	74.5	74.5	97.1
	Multi: White/Other	1	.3	.3	97.4
	Multi: White/Hispanic	4	1.3	1.3	98.7
	Multi: White/Pacific Islander/Hispanic	1	.3	.3	99.0
	Multi: White/Native American/American Indian	2	.7	.7	99.7
	Multi: White/Native American/American Indian/Hispanic	1	.3	.3	100.0
Total		306	100.0	100.0	

Gender

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	103	33.7	33.7	33.7
	Female	203	66.3	66.3	100.0
Total		306	100.0	100.0	

APPENDIX B: SECTION II, QUESTION 7

Participants were asked to "[t]hink generally about the times when you have looked at contract terms at any point with respect to your purchases of products or services. Were any of the terms important to you?" Participant responses as to how important they viewed the various contract terms are presented below.

Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	252	82.4	83.2	83.2
	Somewhat Important	50	16.3	16.5	99.7
	Minor Importance	1	.3	.3	100.0
	Total	303	99.0	100.0	
Missing	System	3	1.0		
Total		306	100.0		

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	236	77.1	77.9	77.9
	Somewhat Important	61	19.9	20.1	98.0
	Minor Importance	5	1.6	1.7	99.7
	Not Important	1	.3	.3	100.0
	Total	303	99.0	100.0	
Missing	System	3	1.0		
Total		306	100.0		

Fees and Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	218	71.2	71.9	71.9
	Somewhat Important	72	23.5	23.8	95.7
	Minor Importance	13	4.2	4.3	100.0
	Total	303	99.0	100.0	
Missing	System	3	1.0		
Total		306	100.0		

Interest Rate for Credit Payment

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	227	74.2	74.7	74.7
	Somewhat Important	48	15.7	15.8	90.5
	Minor Importance	15	4.9	4.9	95.4
	Not Important	14	4.6	4.6	100.0
	Total	304	99.3	100.0	
Missing	System	2	.7		
Total		306	100.0		

Terms for Return

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	201	65.7	66.6	66.6
	Somewhat Important	85	27.8	28.1	94.7
	Minor Importance	13	4.2	4.3	99.0
	Not Important	3	1.0	1.0	100.0
	Total	302	98.7	100.0	
Missing	System	4	1.3		
Total		306	100.0		

Terms for Cancelling Services

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	205	67.0	67.7	67.7
	Somewhat Important	84	27.5	27.7	95.4
	Minor Importance	13	4.2	4.3	99.7
	Not Important	1	.3	.3	100.0
	Total	303	99.0	100.0	
Missing	System	3	1.0		
Total		306	100.0		

Freebies/Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	82	26.8	27.1	27.1
	Somewhat Important	118	38.6	38.9	66.0
	Minor Importance	81	26.5	26.7	92.7
	Not Important	22	7.2	7.3	100.0
	Total	303	99.0	100.0	
Missing	System	3	1.0		
Total		306	100.0		

Must Arbitrate Claims

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	120	39.2	39.6	39.6
	Somewhat Important	110	35.9	36.3	75.9
	Minor Importance	60	19.6	19.8	95.7
	Not Important	13	4.2	4.3	100.0
	Total	303	99.0	100.0	
Missing	System	3	1.0		
Total		306	100.0		

Disclaimers/Liability Waivers

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Very Important	147	48.0	48.4	48.4
	Somewhat Important	109	35.6	35.9	84.2
	Minor Importance	43	14.1	14.1	98.4
	Not Important	5	1.6	1.6	100.0
	Total	304	99.3	100.0	
Missing	System	2	.7		
Total		306	100.0		

APPENDIX C: SECTION II, QUESTION 7, BY GENDER

Participants were asked to "[t]hink generally about the times when you have looked at contract terms at any point with respect to your purchases of products or services. Were any of the terms important to you?" Participant responses, broken down by gender, as to how important they viewed arbitration terms are presented below.

Important Terms: Must Arbitrate Claims

			Very Important	Somewhat Important	Minor Importance	Not Important	
Gender	Male	Count	40	36	23	3	102
		% within Gender	39.2%	35.3%	22.5%	2.9%	100.0%
		% of Total	13.2%	11.9%	7.6%	1.0%	33.7%
	Female	Count	80	74	37	10	201
		% within Gender	39.8%	36.8%	18.4%	5.0%	100.0%
		% of Total	26.4%	24.4%	12.2%	3.3%	66.3%
Total	Count	120	110	60	13	303	
		% within Gender	39.6%	36.3%	19.8%	4.3%	100.0%
		% of Total	39.6%	36.3%	19.8%	4.3%	100.0%

APPENDIX D: SECTION II, QUESTION 8

Participants were asked to "think broadly about how fair (using your own sense of fairness) you view different contracts and purchase terms, regardless of whether you have relevant personal experiences. Please indicate how fair you view the following terms." Participant responses as to how fair they viewed the various contracts and terms are presented below.

Gym Membership Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	12	3.9	4.0	4.0
	Usually Fair	80	26.1	26.9	31.0
	Neutral	118	38.6	39.7	70.7
	Usually Unfair	74	24.2	24.9	95.6
	Completely Unfair	13	4.2	4.4	100.0
	Total	297	97.1	100.0	
Missing	System	9	2.9		
Total		306	100.0		

Company Standard Form Contracts/Purchase Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	8	2.6	2.7	2.7
	Usually Fair	164	53.6	55.2	57.9
	Neutral	102	33.3	34.3	92.3
	Usually Unfair	20	6.5	6.7	99.0
	Completely Unfair	3	1.0	1.0	100.0
	Total	297	97.1	100.0	
Missing	System	9	2.9		
Total		306	100.0		

Employment Contracts and Handbooks

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	34	11.1	11.4	11.4
	Usually Fair	170	55.6	57.0	68.5
	Neutral	73	23.9	24.5	93.0
	Usually Unfair	14	4.6	4.7	97.7
	Completely Unfair	7	2.3	2.3	100.0
	Total	298	97.4	100.0	
Missing	System	8	2.6		
Total		306	100.0		

Loan Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	24	7.8	8.1	8.1
	Usually Fair	132	43.1	44.4	52.5
	Neutral	86	28.1	29.0	81.5
	Usually Unfair	46	15.0	15.5	97.0
	Completely Unfair	9	2.9	3.0	100.0
	Total	297	97.1	100.0	
Missing	System	9	2.9		
Total		306	100.0		

Apartment Leases

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	19	6.2	6.4	6.4
	Usually Fair	134	43.8	45.0	51.3
	Neutral	94	30.7	31.5	82.9
	Usually Unfair	41	13.4	13.8	96.6
	Completely Unfair	10	3.3	3.4	100.0
	Total	298	97.4	100.0	
Missing	System	8	2.6		
Total		306	100.0		

Vehicle Sales Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	19	6.2	6.4	6.4
	Usually Fair	152	49.7	51.0	57.4
	Neutral	80	26.1	26.8	84.2
	Usually Unfair	35	11.4	11.7	96.0
	Completely Unfair	12	3.9	4.0	100.0
	Total	298	97.4	100.0	
Missing	System	8	2.6		
Total		306	100.0		

Credit Card Contracts or Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	18	5.9	6.1	6.1
	Usually Fair	98	32.0	33.0	39.1
	Neutral	78	25.5	26.3	65.3
	Usually Unfair	84	27.5	28.3	93.6
	Completely Unfair	19	6.2	6.4	100.0
	Total	297	97.1	100.0	
Missing	System	9	2.9		
Total		306	100.0		

Internet Contract/Purchase Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	12	3.9	4.1	4.1
	Usually Fair	120	39.2	40.5	44.6
	Neutral	139	45.4	47.0	91.6
	Usually Unfair	19	6.2	6.4	98.0
	Completely Unfair	6	2.0	2.0	100.0
	Total	296	96.7	100.0	
Missing	System	10	3.3		
Total		306	100.0		

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	24	7.8	8.1	8.1
	Usually Fair	160	52.3	53.9	62.0
	Neutral	73	23.9	24.6	86.5
	Usually Unfair	37	12.1	12.5	99.0
	Completely Unfair	3	1.0	1.0	100.0
	Total	297	97.1	100.0	
Missing	System	9	2.9		
Total		306	100.0		

Cell Phone Contracts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	16	5.2	5.4	5.4
	Usually Fair	94	30.7	31.8	37.2
	Neutral	83	27.1	28.0	65.2
	Usually Unfair	83	27.1	28.0	93.2
	Completely Unfair	20	6.5	6.8	100.0
	Total	296	96.7	100.0	
Missing	System	10	3.3		
Total		306	100.0		

Contracts with Family

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	34	11.1	11.6	11.6
	Usually Fair	87	28.4	29.6	41.2
	Neutral	146	47.7	49.7	90.8
	Usually Unfair	18	5.9	6.1	96.9
	Completely Unfair	9	2.9	3.1	100.0
	Total	294	96.1	100.0	
Missing	System	12	3.9		
Total		306	100.0		

Contracts With Friends

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	26	8.5	8.8	8.8
	Usually Fair	92	30.1	31.2	40.0
	Neutral	151	49.3	51.2	91.2
	Usually Unfair	15	4.9	5.1	96.3
	Completely Unfair	11	3.6	3.7	100.0
	Total	295	96.4	100.0	
Missing	System	11	3.6		
Total		306	100.0		

Dispute or Claim Settlement Agreement

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Completely Fair	17	5.6	5.8	5.8
	Usually Fair	79	25.8	26.9	32.7
	Neutral	131	42.8	44.6	77.2
	Usually Unfair	60	19.6	20.4	97.6
	Completely Unfair	7	2.3	2.4	100.0
	Total	294	96.1	100.0	
Missing	System	12	3.9		
Total		306	100.0		

APPENDIX E: SECTION III, QUESTION 7

Participants were asked if they "[h]ad seen or noticed anything about 'arbitration' in any consumer purchase contract or terms."

Ever Seen or Noticed Arbitration in Consumer Contracts or Terms

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	151	49.3	50.5	50.5
	Yes	148	48.4	49.5	100.0
	Total	299	97.7	100.0	
Missing	System	7	2.3		
Total		306	100.0		

APPENDIX F: SECTION III, QUESTION 7, BY GENDER

Participants were asked if they "[h]ad seen or noticed anything about 'arbitration' in any consumer purchase contract or terms." Participant responses, broken down by gender, are included below.

Ever Seen or Noticed Arbitration in Consumer Contracts or Terms

			No	Yes	Total
Gender	Male	Count	47	54	101
		% within Gender	46.5%	53.5%	100.0%
		% of Total	15.7%	18.1%	33.8%
	Female	Count	104	94	198
		% within Gender	52.5%	47.5%	100.0%
		% of Total	34.8%	31.4%	66.2%
Total		Count	151	148	299
		% within Gender	50.5%	49.5%	100.0%
		% of Total	50.5%	49.5%	100.0%

APPENDIX G: SECTION III, QUESTION 6

Participants were asked to "[t]hink generally about any complaints or disputes you have had regarding consumer purchases of products or services. What, if any, terms have you found to be important at some point with respect to a complaint or dispute?" Participant responses are presented below.

Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	245	80.1	80.1	80.1
	Yes	61	19.9	19.9	100.0
	Total	306	100.0	100.0	

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	132	43.1	43.1	43.1
	Yes	174	56.9	56.9	100.0
	Total	306	100.0	100.0	

Fees/Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	192	62.7	62.7	62.7
	Yes	114	37.3	37.3	100.0
	Total	306	100.0	100.0	

Interest Rate for Credit Payment

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	240	78.4	78.4	78.4
	Yes	66	21.6	21.6	100.0
	Total	306	100.0	100.0	

Returning Items

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	153	50.0	50.0	50.0
	Yes	153	50.0	50.0	100.0
	Total	306	100.0	100.0	

Cancelling Service

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	163	53.3	53.3	53.3
	Yes	143	46.7	46.7	100.0
	Total	306	100.0	100.0	

Arbitration Requirements

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	271	88.6	88.6	88.6
	Yes	35	11.4	11.4	100.0
	Total	306	100.0	100.0	

Freebies/Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	279	91.2	91.2	91.2
	Yes	27	8.8	8.8	100.0
	Total	306	100.0	100.0	

Disclaimers/Liability Waivers

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	252	82.4	82.4	82.4
	Yes	54	17.6	17.6	100.0
	Total	306	100.0	100.0	

Other (Yes/No)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	299	97.7	97.7	97.7
	Yes	7	2.3	2.3	100.0
	Total	306	100.0	100.0	

Never Had a Dispute or Claim

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	246	80.4	80.4	80.4
	Yes	60	19.6	19.6	100.0
	Total	306	100.0	100.0	

APPENDIX H: SECTION 3, QUESTION 1, BY GENDER

Participants were asked to "focus again on your consumer purchases and the form contracts or purchase terms you encounter when buying consumer products and services. Roughly, how often do you try to negotiate or change such form contracts or terms when you purchase consumer products or services?" Participant responses, broken down by gender, are listed below.

How Often Change Contracts or Terms

			Never	Rarely	Sometimes	Half the Time	Frequently	Nearly All the Time	Total
Gender	Male	Count	26	28	31	6	7	3	101
		% within Gender	25.7%	27.7%	30.7%	5.9%	6.9%	3.0%	100.0%
		% of Total	8.6%	9.2%	10.2%	2.0%	2.3%	1.0%	33.3%
	Female	Count	89	55	34	8	12	4	202
		% within Gender	44.1%	27.2%	16.8%	4.0%	5.9%	2.0%	100.0%
		% of Total	29.4%	18.2%	11.2%	2.6%	4.0%	1.3%	66.7%
Total	Count	115	83	65	14	19	7	303	
		% within Gender	38.0%	27.4%	21.5%	4.6%	6.3%	2.3%	100.0%
		% of Total	38.0%	27.4%	21.5%	4.6%	6.3%	2.3%	100.0%

APPENDIX I: SECTION 3, QUESTION 1B

Participants were asked, "What types of terms have you been able to get changed in form contracts?" Participant responses are listed below.

Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	47	29.7	29.7	29.7
	Yes	111	70.3	70.3	100.0
	Total	158	100.0	100.0	

Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	117	74.1	74.1	74.1
	Yes	41	25.9	25.9	100.0
	Total	158	100.0	100.0	

Fees/Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	97	61.4	61.4	61.4
	Yes	61	38.6	38.6	100.0
	Total	158	100.0	100.0	

Interest Rate for Credit Payment

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	112	70.9	70.9	70.9
	Yes	46	29.1	29.1	100.0
	Total	158	100.0	100.0	

Terms for Returning

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	118	74.7	74.7	74.7
	Yes	40	25.3	25.3	100.0
	Total	158	100.0	100.0	

Terms for Cancelling Services

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	126	79.7	79.7	79.7
	Yes	32	20.3	20.3	100.0
	Total	158	100.0	100.0	

Arbitration Claims

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	151	95.6	95.6	95.6
	Yes	7	4.4	4.4	100.0
	Total	158	100.0	100.0	

Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	122	77.2	77.2	77.2
	Yes	36	22.8	22.8	100.0
	Total	158	100.0	100.0	

Disclaimers/Liability Waivers

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	141	89.2	89.2	89.2
	Yes	17	10.8	10.8	100.0
	Total	158	100.0	100.0	

APPENDIX J: SECTION III, QUESTION 3

Participants were asked to "[i]magine that you are shopping for a car, and have found the one you think you want. The salesperson gives you a 5 page contract with purchase terms, and asks you to sign it in order to finalize the purchase. Please review the list of purchase terms below, and check all the terms that you would want the salesperson to explain to you." Participant responses are listed below.

Explain Price

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	84	27.5	27.5	27.5
	Yes	222	72.5	72.5	100.0
	Total	306	100.0	100.0	

Explain Warranties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	24	7.8	7.8	7.8
	Yes	282	92.2	92.2	100.0
	Total	306	100.0	100.0	

Explain Fees/Penalties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	49	16.0	16.0	16.0
	Yes	257	84.0	84.0	100.0
	Total	306	100.0	100.0	

Explain Interest Rate for Payment

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	76	24.8	24.8	24.8
	Yes	230	75.2	75.2	100.0
	Total	306	100.0	100.0	

Explain Terms for Return

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	73	23.9	23.9	23.9
	Yes	233	76.1	76.1	100.0
	Total	306	100.0	100.0	

Explain Arbitration Requirements

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	135	44.1	44.1	44.1
	Yes	171	55.9	55.9	100.0
	Total	306	100.0	100.0	

Explain Freebies/Incentives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	157	51.3	51.3	51.3
	Yes	149	48.7	48.7	100.0
	Total	306	100.0	100.0	

Explain Disclaimers/Liability Waivers

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	76	24.8	24.8	24.8
	Yes	230	75.2	75.2	100.0
	Total	306	100.0	100.0	

Explain Boilerplate

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	179	58.5	58.5	58.5
	Yes	127	41.5	41.5	100.0
	Total	306	100.0	100.0	

Explain Technical/Legal Words

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	122	39.9	39.9	39.9
	Yes	184	60.1	60.1	100.0
	Total	306	100.0	100.0	

Explain Other (Yes/No)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	300	98.0	98.0	98.0
	Yes	6	2.0	2.0	100.0
	Total	306	100.0	100.0	

No Terms Explained

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	301	98.4	98.4	98.4
	Yes	5	1.6	1.6	100.0
	Total	306	100.0	100.0	

APPENDIX K: SECTION III, QUESTION 3, BY GENDER

Participants were asked to "[i]magine that you are shopping for a car, and have found the one you think you want. The salesperson gives you a 5 page contract with purchase terms, and asks you to sign it in order to finalize the purchase. Please review the list of purchase terms below, and check all the terms that you would want the salesperson to explain to you." Participant responses to the arbitration question, broken down by gender, are listed below.

Explain Arbitration Requirements

			No	Yes	Total
Gender	Male	Count	48	55	103
		% within Gender	46.6%	53.4%	100.0%
		% of Total	15.7%	18.0%	33.7%
	Female	Count	87	116	203
		% within Gender	42.9%	57.1%	100.0%
		% of Total	28.4%	37.9%	66.3%
Total	Count	135	171	306	
		% within Gender	44.1%	55.9%	100.0%
		% of Total	44.1%	55.9%	100.0%