Journal of Dispute Resolution

Volume 2020 | Issue 2 Article 10

2020

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Recommended Citation

Amy J. Schmitz, *Addressing the Class Claim Conundrum with Online Dispute Resolution*, 2020 J. Disp. Resol. ()
Available at: https://scholarship.law.missouri.edu/jdr/vol2020/iss2/10

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Addressing the Class Claim Conundrum with Online Dispute Resolution

Amy J. Schmitz[*]

Consumers with similar claims in the United States (U.S.) often join forces to launch representative, or "class," actions. This allows them to obtain remedies with little cost and effort and serves a "private attorney general" function by bringing light to purchase problems that public enforcement offices may not have the resources to address. This is especially important for lower dollar claims that are too costly for each consumer to pursue individually.

Nonetheless, some have criticized class actions in the U.S. for forcing settlements and padding the pockets of lawyers, while leaving consumers with minimal pay–outs. At the same time, European consumers complain that the lack of class action procedures in the European Union (E.U.) has diminished their access to remedies for small dollar claims. Accordingly, there are complaints on both sides; some view the "U.S. class action system" as abusive while others argue that the E.U. should adopt a similar system in order to provide access to remedies through mass claims.

This Article provides a brief comparison of U.S. versus E.U. law with respect to class actions, noting how this dichotomy creates a "class action conundrum" due to these actions' vices and virtues. The Article then argues that in light of this conundrum, it is time to consider innovations beyond class actions. The time is ripe to renew consideration of a global online dispute resolution ("ODR") process for mass claims to promote consumer protection on a worldwide level.

I. INTRODUCTION

Consumers may suffer the same harms but enjoy different access to remedies due to jurisdictional differences in laws and procedures for obtaining remedies. For example, consumers in different parts of the world received different remedies with respect to Volkswagen's ("VW") use of software in its diesel engines to manipulate emission levels–also known as "Dieselgate."[1] In that case, VW intentionally programmed turbocharged direct injection ("TDI") diesel engines to activate their emissions controls only during laboratory emissions testing.[2] This manipulation caused the vehicles' nitrogen oxides (NOx) readings to meet United States and

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1. Maria Juul, *Lawsuit Triggered by the Volkswagen Emissions Case*, EUROPEAN PARLIAMENTARY RESEARCH SERV. 1 (May 2016).

2. Jack Ewing, *Ex–Volkswagen C.E.O. Charged with Fraud Over Diesel Emissions*, N.Y. TIMES (May 3, 2018), https://www.nytimes.com/2018/05/03/business/volkswagen-ceo-diesel-fraud.html; *see also Learn About Volkswagen Violations*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/vw/learn-about-volkswagen-violations (last updated Sept. 27, 2019).

European Union standards during testing, but emit up to forty times more NOx in real–world driving.[3] VW deployed this programming software in about eleven million cars worldwide, including over 500,000 cars in the U.S.[4]

This manipulation caused financial and psychological injuries to consumers who felt VW had betrayed them.[5] Consumers who believed that they purchased environmentally friendly cars were aghast when they learned they had purchased vehicles that not only defied so–called "green" marketing and advertisements, but were so "dirty" that it was illegal to drive them in the U.S. and the E.U.[6] This news destroyed the cars' value and inflicted identity harm on consumers who suddenly learned their cars were especially bad for the environment.[7] It also sparked U.S. government enforcement actions from many angles: Department of Justice, Environmental Protection Agency ("EPA"),[8] California Air Resources Board, Federal Trade Commission ("FTC"), Customs and Border Protection, and state Attorneys General.[9]

Dieselgate created a perfect storm of litigation in the U.S.[10] Enforcement actions gave way to class actions, as a reported 482,632 consumers submitted claims with respect to VW 2–Liter vehicles alone.[11] In the subsequent litigation, 373,623 of those owners and lessees resolved their disputes in consolidated class actions, resulting in a total consumer payout of $7,830,065,930.03. Additionally, VW either removed from commerce or properly modified approximately 93.4% of the affected 2–Liter vehicles by the end of 2018.[12] At the same time, 70,839 VW consumers had submitted claims in the consolidated class litigation regarding 3–Liter vehicles, resulting in 64,885 consumers accepting settlement offers totaling $1,027,699,629.15.[13] Meanwhile, enforcement actions and varied forms of

3. Juul, *supra* note 1, at 2; *see also* Ewing, *supra* note 2.

4. Juul, *supra* note 1, at 2; *Learn About Volkswagen Violations*, *supra* note 2; *see also* John C. Cruden et al., *Dieselgate: How the Investigation, Prosecution, and Settlement of Volkswagen's Emissions Cheating Scandal Illustrates the Need for Robust Environmental Enforcement*, 36 VA. ENVTL. L.J. 118, 126 (2018).

5. Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 865–68 (2018).

6. *Id.* at 889–91.

7. *Id.* at 891–92.

8. *U.S. Files Complaint Against Volkswagen, Audi, & Porsche for Alleged Clean Air Act Violations*, U.S. DEP'T OF JUSTICE (Jan. 4, 2016), https://www.justice.gov/opa/pr/united-states-files-complaint-against-volkswagen-audi-and-porsche-alleged-clean-air-act.

9. *Learn About Volkswagen Violations*, *supra* note 2; *Volkswagen AG Pleads Guilty in Connection with Conspiracy to Cheat U.S. Emissions Tests*, U.S. DEP'T OF JUSTICE (Mar. 10, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-pleads-guilty-connection-conspiracy-cheat-us-emissions-tests; *CBP Joins DOJ, FBI, & EPA in Announcing a Settlement Against Volkswagen as a Result of Their Scheme to Cheat U.S. Emissions Test*, U.S. CUSTOMS & BORDER PROT. (Jan. 12, 2017), https://www.cbp.gov/newsroom/spotlights/cbp-joins-doj-fbi-and-epa-announcing-settlement-against-volkswagen-result-their.

10. *See* Nick Conger & Julia Valentine, *Reference News Release: Volkswagen to Spend Up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests & Deceiving Customers on 2.0 Liter Diesel Vehicles*, U.S. ENVTL. PROT. AGENCY (June 28, 2016), https://www.epa.gov/enforcement/reference-news-release-volkswagen-spend-147-billion-settle-allegations-cheating.

11. Report of Indep. Claims Supervisor on Volkswagen's Progress & Compliance Related to 2.0 Liter Resolution Agreements Entered Oct. 25, 2016, Case No. 3:15-md-02672-CRB 1, 3 (Nov. 26, 2018), https://www.cand.uscourts.gov/crb/vwmdl/claims-reports.

12. *Id*. at 6. The terms of the settlement called for eighty–five percent to have been removed or modified by May 1, 2018. *Id.*

13. Report of Indep. Claims Supervisor on Volkwagen's Progress & Compliance Related to 3.0 Liter Resolution Agreements 4, Case No. 3:15–md–02672–CRB (Mar. 13, 2019), https://www.cand.uscourts.gov/crb/vwmdl/claims-reports.

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litigation have brewed throughout the world, but European consumers claim remedies have been slow and scant in most of the E.U., arguably due to lack of class relief.[14] Even in VW's home country of Germany, many consumers are still in the litigation line, waiting to get remedies.

This example shows how class actions can be an integral means for U.S. consumers to obtain remedies in mass claims. This is especially true because they allow individuals to obtain remedies without having to proactively litigate, making it more cost–effective to pursue remedies on small–dollar claims. Furthermore, class actions allow consumers to act as "private attorneys general" in bringing lawsuits as a group to shed light on improprieties.[15] Indeed, class relief has been the primary means for U.S. consumers to pursue remedies in mass business–to–consumer ("B2C") transactions.

However, some have critiqued American class actions for padding the pockets of lawyers while leaving consumers without full redress. This perception arises because lawyers are usually able to obtain their attorney fees when representing class actions. Furthermore, class actions have been diminished in the U.S. due to the strict enforcement of pre–dispute arbitration clauses under the Federal Arbitration Act ("FAA").[16] In contrast, the E.U. has been more proactive in its refusal or reluctance to enforce pre–dispute arbitration clauses in B2C contracts.[17] Arguably, this makes it easier for individual consumers to assert their claims in litigation, as they at least bypass the quandary that American consumers face when forced to assert claims in costly and inconvenient arbitration procedures. European consumers nonetheless lament their lack of access to class actions, as they often must wait in line while seeking to pursue individual litigation. This has fuelled proposals for class, or representative, actions in the E.U.

Meanwhile, online dispute resolution ("ODR") systems are expanding access to remedies in B2C purchases throughout the world. This ODR includes use of technology and computer–mediated–communications ("CMC") to assist dispute resolution through means such as online negotiation, mediation, and arbitration. In fact, the E.U. has adopted a Directive on Alternative Dispute Resolution for Consumer Disputes (the "ADR Directive")[18] and a Regulation on Online Dispute Resolution for Consumer Disputes (the "ODR Regulation"),[19] which work in tandem to require member states to implement ODR systems for consumer claims.

14. *See* Kevin Tarsa, *Won't Get Fooled Again: Why VW's Emissions Deception is Illegal in Europe and How to Improve the E.U.'s Auto Regulatory System*, 40 B.C. INT'L & COMP. L. REV. 315 (2017).

15. Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Response to Concepcion*, 46 U. MICH. J. L. REFORM 1203, 1221 (2013).

16. Federal Arbitration Act, 9 U.S.C. §§ 201–08, 301–07 (1970) (implementing the N.Y. Convention under sections 201–08 and the Panama Convention under sections 301–07); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233–55 (2006) (noting how the U.S.'s strict enforcement of arbitration is distinct). J. Maria Glover, *Disappearing Claims and the Erosion of Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052, 3070–84 (2015).

17. James R. Bucilla II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST L. REV. 102, 133–49 (2014).

18. Council Directive 2013/11, 2013 O.J. (L 165) 63 (E.U.).

19. Commission Regulation 524/2013, 2013 O.J. (L 165) 1 (E.U.).

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Furthermore, ODR projects in the courts are flourishing in the U.S. and throughout the world.[20]

At the same time, the United Nations Commission on International Trade Law ("UNCITRAL") spent many years advancing ODR for cross–border ecommerce through its Working Group III on Online Dispute Resolution.[21] While Working Group III did not produce a treaty establishing a global ODR system, it ended in 2016 with a strong statement encouraging further developments toward a global ODR mechanism for consumer claims.[22] Technology has advanced considerably since 2016, and the momentum to use ODR to expand access to justice is stronger than ever.[23]

The need for ODR is especially robust where consumers suffer similar harms throughout the world, but receive differential redress based on where they reside. Therefore, it is high time to establish global ODR for consumer mass claims to help shed light on consumer protection issues and provide equitable redress for all consumers, regardless of where they live.[24] The discussion need not myopically focus on class actions when it comes to consumer remedies. Instead, ODR may provide an additional means for accessing justice in consumer mass claims.

Accordingly, Section II of this Article will provide a brief snapshot of consumer mass claims procedures in the U.S. and explain some of the debates regarding class actions and arbitration clauses. Section III provides a glimpse into the debate regarding representative actions under E.U. law. Next, Section IV introduces ODR and suggest ideas for using ODR to bypass the class action debate and allow for an additional, alternative mechanism for promoting fairness, transparency, and efficiency while expanding consumers' access to remedies with respect to consumer mass claims. Section V will conclude.

II. PURSUING MASS CONSUMER CLAIMS IN THE U.S.

In the U.S., public and private actions may work in concert to provide redress for consumers while enjoining malfeasance and imposing fines or sanctions against bad actors in the marketplace. Nonetheless, companies may continue to act improperly without reproach where regulators do not have time or resources to pursue them, or when a case is not sufficiently large or lucrative for class action attorneys to take it on.[25] Hence, the U.S. system works fairly well when regulators and class action law firms invest in pursuing bad actors, but the system may fail when cases never gain steam for economic or political reasons, or arbitration clauses cut off access to class remedies. Furthermore, class actions have their own critics due to high litigation costs and sometimes unsatisfying payouts.

20. Amy J. Schmitz, *Expanding Access to Remedies through E–Court Initiatives*, 67 BUFF. L. REV. 89, 91–92 (2019).

21. U.N. Comm'n on Int'l Trade Law on the Work of Its Twenty–Ninth Session, U.N. Doc. A/CN.9/WG.III/WP.128 (2014).

22. U.N. Comm'n on Int'l Trade Law on the Work of Its Thirty–Third Session, U.N. Doc. A/CN.9/WG.III/868 (2016).

23. *See also* AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION 27 (2017).

24. *Id.*

25. Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 863–75 (2018) (noting how deceptive trade practices can harm individuals emotionally as well as financially).

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A. Government Actions Based on Statutory Claims

As Dieselgate illustrated, government agencies in the U.S. may act in concert or alone under various laws to pursue companies that violate consumer protection laws.[26] Furthermore, when it comes to seeking redress for consumers' typical B2C claims, the FTC and the Consumer Financial Protection Bureau ("CFPB") are paramount. The FTC is the primary federal agency to pursue enforcement actions regarding "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[27] A deceptive act includes "a representation, omission, or practice that [is] likely to mislead a consumer acting reasonably in the circumstances, to the consumer's detriment."[28] The CFPB is the primary federal agency that enforces laws and regulations related to consumer financial products and services.[29] This includes issues having to do with credit cards, and other lending products, that are often problematic for low–income consumers who face significant difficulty in affording court process.[30]

Other laws address illegal profits skimming, which occurs when companies do not disclose their full income on tax returns.[31] Additionally, U.S. consumers may use the Magnuson–Moss Act for breach of warranty claims.[32] The Act establishes an implied warranty of merchantability and clear rules companies must follow to disclaim or limit the warranty.[33] Consumer laws also require that companies adequately label their products, and that the products "pass without objection in the trade as designed, manufactured, and marketed."[34]

At the state level, consumers may also rely on their state unfair trade practices statutes.[35] In some situations, state Attorneys General also may bring suits on behalf of the residents of their states.[36] These actions allow for injunctions, civil penalties, and public compensation.[37] At the same time, state Attorneys General may join together when they all have citizens with similar harms.[38] For example, state Attorneys General may seek to consolidate discovery and share resources where

26. *Learn About Volkswagen Violations*, *supra* note 2; *Laws & Regulations related to Volkswagen Violations*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/vw/laws-and-regulations-related-volkswagen-violations (last visited Feb. 27, 2020).

27. 15 U.S.C. § 45 (2018).

28. Sw. Sunsites, Inc. v. F.T.C., 785 F.2d 1431, 1435 (9th Cir. 1986).

29. Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 904 (2015).

30. *Id.* at 904–05.

31. *Georgia Couple Sentenced to Prison for Tax Fraud*, DEP'T OF JUSTICE (Oct. 7, 2015), https://www.justice.gov/opa/pr/georgia-couple-sentenced-prison-tax-fraud. A federal bill was introduced, but not enacted, that would have focused upon skimming profits, the Equity Skimming Prevention Act. Equity Skimming Prevention Act, S.B. 2462, 103d Cong. § 2 (1994).

32. Doebler v. Volkswagen Grp. of Am. (Oct. 7, 2015) (No. 1:15–cv–23753–PCH).

33. *Id.* at 15.

34. *Id.*

35. *Consumer Protection in the States: Appendix B State–by–State Summaries of State UDAP Statutes*, NAT'L CONSUMER LAW CTR. (Jan. 10, 2009), https://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

36. Elysa Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, SSRN 8 (Sept. 19, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252149.

37. *Id.* at 10.

38. *Id.* at 13.

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their claims are essentially identical.[39] Still, these actions cause some controversy where it appears that larger and more powerful states gain the upper hand.[40]

Nonetheless, government actions do not take the place of private class actions in the U.S. Instead, multiple actions may coexist in the U.S. In *United States v. Kordel*, for example, the court held that a governmental agency does not have to choose one course of proceedings, meaning an agency is free to bring both civil and criminal proceedings at a single point in time.[41] Accordingly, it was appropriate in the Dielselgate situation for the EPA to seek both criminal and civil penalties against VW at the same time.[42]

B. Class Actions

Many may assume that class actions are a new phenomenon. To the contrary, the idea of representative actions actually originated in old common law under the auspices of "bills of peace."[43] These "bills of peace" allowed a representative to bring or defend a suit on behalf of a group of individuals to promote judicial economy and fair redress.[44] Like bills of peace, modern class actions aim to efficiently compensate victims.[45] They also serve a "private attorney general function" by allowing individuals to lead group actions that shed light on purchase problems and make it possible for individuals to obtain redress in small dollar cases that would not be worth the cost or effort to pursue on an individual basis.

These ideas are at the foundation of the Federal Rule of Civil Procedure ("FRCP") 23, which formalizes the procedure for the formation of class, or representative, actions.[46] Furthermore, FRCP 23 was amended in 1966 to shift the procedure from "opt–out" to an "opt–in" default, meaning that individuals now must proactively opt out of a class action to avoid being a member.[47] FRCP Rule 23(c)(2) places the burden on the petitioner to provide notice for the class action.[48]

FRCP 23 also provides for liberal funding schemes to ease difficulties of obtaining counsel in such cases. First, the rules provide for a "common funding mechanism."[49] This requires all beneficiaries of a class action to contribute to a common fund for maintaining a class action.[50] Second, class action rules allow for a shift in the usual U.S. rule requiring parties to pay their own legal fees[51]; this means that state or federal laws may permit plaintiffs in class actions to recover

39. *Id.* at 16.
40. *Id.* at 22.
41. United States v. Kordel, 397 U.S. 1, 11–13 (1970).
42. United States v. Stringer, 535 F.3d 929, 936 (9th Cir. 2008), *cert. denied*, 555 U.S. 1049 (2008).
43. Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711, 712 (1997).
44. *Id.*
45. *See generally* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 399–418 (2014).
46. FED. R. CIV. P. 23.
47. Scott Dodson, *Article: An Opt–In Option for Class Actions*, 115 MICH. L. REV. 171, 179 (2016).
48. FED. R. CIV. P. 23 (c)(2).
49. FED. R. CIV. P. 23(h) (advisory committee's note to 2003 amendment).
50. *Id.*
51. Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presentation at Debates over Group Litigation in Comparative Perspective 11, Paper Presented at the Debates over Group Litigation in Comparative Perspective Conference, Geneva, Switzerland (July 21–22, 2000), https://law.duke.edu/grouplit/papers/classactionalexander.pdf.

attorney fees from the defendant if their suit is successful.[52] At the same time, it is common in the U.S. for attorneys to take on class actions using a contingency fee. In other words, attorneys get paid a percentage of the eventual award or settlement, and lead plaintiffs often invest little to nothing in filing a class action.

Companies in the U.S. generally dislike class actions and lament their power to allegedly "extort" large settlements.[53] They complain that defendants have no analogous "loser pays" right if their defense is successful, meaning that plaintiffs with arguably baseless claims are never left paying defendants' attorney fees.[54] Companies complain the contingency fee model sparks attorneys to instigate class claims, even when consumers do not feel harmed or aggrieved.[55] Additionally, complex class–certification rules and confusing jurisprudence regarding class procedures have hindered the efficiency and deterrence goals of class actions.[56]

Conflicts of interest between class attorneys and class members threaten the prospect that class members will actually receive the relief they deserve.[57] Attorney fees and litigation costs may deplete class awards and settlements, leaving little to compensate individual claimants.[58] Furthermore, attorneys may shy away from cases involving many claimants with small claims because the costs of providing notice and administering claims may exhaust any eventual settlement available to pay the attorneys.[59] Moreover, some class attorneys increase these risks of depleted class resources by raising their fees during the litigation process.[60]

Despite these criticisms, class actions remain a primary vehicle for consumers to obtain relief with respect to mass claims. Indeed, it may be the only efficient means for obtaining relief in small dollar claims where the cost of individually pursuing the claims would exceed any likely payout. Furthermore, class actions do play an important role in shedding light on corporate improprieties. Class actions in the U.S. also benefit from rules requiring courts to give full faith and credit to the judgements of other states under the U.S. Constitution.[61] Additionally, federal courts must give state judgments full faith and credit.[62]

52. David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1792 (2018).

53. Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2018–19 (2016).

54. *Id.* at 2041 (explaining that plaintiffs may be sanctioned if a claim does not pass "Rule 11" muster and is deemed wholly frivolous); *see also* Shay Lavie, *The Malleability of Collective Litigation*, 88 NOTRE DAME L. REV. 697, 710 (2012).

55. Gold, *supra* note 53, at 2002.

56. Mullinex, *supra* note 45, at 419 (explaining how class notices may disclose the total amount received through settlement but provide no information about payment of individual claims).

57. George Rutherglen, *Wal–Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 26 (2012).

58. *Id.* at 24–27.

59. *Id.*

60. *Id.*

61. *See* V.L. v. E.L., 136 S. Ct. 1017 (2016) (explaining that the Full Faith and Credit Clause "requires each state to recognize and give effect to valid judgments rendered by the courts of its sister States.").

62. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982).

C. Contractually Required Arbitration in the U.S.

Despite the "hype" around class actions in the U.S., their power is diminishing in the wake of arbitration clauses.[63] Indeed, no discussion regarding class actions is complete without a note regarding pre–dispute arbitration clauses.[64] This is because many businesses insist upon arbitration clauses with class action waivers in all of their consumer contracts to maintain privacy of claims, save litigation costs, and preclude what can be a public relations nightmare with class claims.[65] For example, VW sought to preclude consumers' claims based on arbitration clauses in their purchase agreements with the dealerships.[66] The problem for VW, however, was that it was not a party to the dealership agreements containing the arbitration clauses. Nonetheless, VW would have been able to preclude class actions with the consumers where it was a direct party to the contracts containing the arbitration clauses.[67]

The presence of arbitration clauses is important in the U.S. because the U.S. Supreme Court has interpreted and applied the Federal Arbitration Act ("FAA") to require strict enforcement of pre–dispute arbitration clauses in B2C contracts.[68] This is true even when statutory claims are at stake.[69] Courts in the U.S. also construe arbitration clauses broadly to cover tort and statutory claims regardless of whether a clause gives express notice of such coverage.[70] Additionally, consumers must overcome a high burden to show that arbitration costs effectively prohibit claimants from vindicating their statutory rights.[71]

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63. *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015) (finding that recent Supreme Court holdings authorize businesses to include class action waivers along with arbitration clauses).

64. *See* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 290–91 (2015) (providing a history of the expansion of arbitration clauses); *see also* Lavie, *supra* note 54, at 705–09 (demonstrating how business can "cherry–pick" plaintiffs in class action suits by settling with stronger plaintiffs).

65. Fitzpatrick, *supra* note, at 164–97; *see also* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near–Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 406–08 (2005).

66. *Order In re: Volkswagen Timing Chain Product Liability Litigation* (No. 2:16–cv–02765) (May 8, 2017) (denying enforcement of an arbitration clause to preclude a lawsuit against VW).

67. Beasley Allen, *Judge Denies VW Arbitration Bid in Engine Defect Suit*, JERE BEASLEY REPORT (June 9, 2017), http://www.jerebeasleyreport.com/2017/06/judge-denies-vw-arbitration-bid-engine-defect-suit/.

68. *See* AT&T Mobility, L.L.C. v. Concepcion, 563 U.S. 333, 334–59 (2011); *see also* Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); Rent–A–Ctr, W., Inc. v. Jackson, 561 U.S. 63, 68–74 (2010).

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

70. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24–26 (1991) (finding statutory age discrimination statute could be subject to arbitration).

71. Green Tree Fin. Corp. v. Randolph, 531 U.S., 91–92 (200) (finding that although Randolph had provided information regarding high AAA arbitration fees and costs, he still had not overcome his burden of proof); American Express v. Italian Colors Restaurant, 570 U.S. 228, 233–34 (2013) (emphasizing there is no right to economical means for asserting anti–trust claims).

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It is also important to note that class arbitration is rare–to–non–existent in the wake of the U.S. Supreme Court's ruling in *Stolt–Nielsen S.A. v. Animalfeeds International Corp.*[72] In that case, the Court held that arbitrators exceeded their authority in ordering class arbitration where the contract between shipping companies and their customers was silent on class relief.[73] Nonetheless, most consumer contracts expressly preclude class proceedings, and it is very difficult to challenge class waivers following the decision in *AT&T Mobility, L.L.C. v. Concepcion*.[74] The Supreme Court held that the FAA pre–empts a state court from using unconscionability to essentially safeguard a right to bring class actions or class–wide arbitration.[75] Moreover, the CFPB had approved a final rule precluding the enforcement of pre–dispute arbitration clauses in consumer financial products and services agreements where they would stop class actions, but the current administration essentially shut down the rule.[76]

In contrast to the U.S. Supreme Court's application of the FAA, Annex 1[q] of the E.U. Directive 13/93 makes pre–dispute arbitration clauses "prima facie" invalid.[77] Furthermore, the E.U. ADR Directive states that nationally certified ADR/ODR entities cannot use pre–dispute arbitration clauses.[78] Additionally, the European Court of Justice ruled in *Mostaza Claro v. Centro Movil Milenium* that courts should closely examine arbitration clauses in B2C contracts to ensure that they are fair, especially where their enforcement would effectively cut off a consumers' access to redress.[79]

This contrasting law on arbitration highlights the importance of providing consumers with accessible means for obtaining remedies.[80] Sadly, arbitration clauses often prevent consumers from pursuing claims and let companies "off the hook" for wrongdoing.[81] Despite this reality, legal economists often argue that arbitration clauses are ultimately "good" for all consumers because companies pass on savings from arbitration to consumers through lower prices and better products and services.[82] However, there is no empirical proof of this assumption and, as noted above, class actions shed light on product defects, initiate recalls, and inform

72. *Stolt–Nielsen S.A.*, 559 U.S. at 662.

73. *Id*. at 673–87. *But see* Oxford Health Plans L.L.C. v. Sutter, 569 U.S. 564, 564–73 (2013) (refusing to void class arbitration order).

74. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 38 ("Of the arbitration clauses in the sample [of credit card agreements], forty–four of forty–seven clauses (or 93.6%) (covering 99.9% of the credit card loans outstanding) waived any right to class arbitration.").

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

76. *CFPB Issues Rule to Ban Consumers from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROT. BUREAU (updated Nov. 22, 2017, after the rule was reversed), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/.

77. Council Directive 93/13, 1993 O.J. (L 95) 34 (EEC).

78. Council Directive 2013/11, 2013 O.J. (L 165) 63–79 (E.U.).

79. C–168/05, Mostaza Claro v. Centro Móvil Milenium, 2006 E.C.R. I–10421.

80. With the growth of mandatory arbitration clauses, businesses have gained quasi–lawmaking powers that significantly decrease the compensatory and public deterrent objectives of consumer protection laws. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 125 YALE L.J. 3052 (2015).

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

82. *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).

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other consumers about purchase problems.[83] They also allow individuals to assert small dollar claims in an economical manner.[84] Accordingly, class actions play an important role in a consumer protection scheme.

That is not to say that class actions are ideal.[85] As noted above, class actions have their critics. Accordingly, this Article suggests ideas for adding a new online mechanism for pursuing mass claims–Online Dispute Resolution ("ODR"). Furthermore, the ODR process coupled with a "trip wire" for mass claims could help even the playing field and allow for consumers with similar harms to receive similar compensation, regardless of their zip code. This would also aid regulators in coordinating their efforts to stop mass deception such as what we saw in the Dieselgate case.[86]

III. CLASS ACTION DEBATES IN EUROPE

Each Member State in the E.U. may have some form of representative action, although American style "class actions" are fairly rare in Europe overall. Nonetheless, this Section is merely looking at the E.U. Directives and Proposals related to allowance for consumer representative, or class, actions. It will not attempt to tackle the details of the individual Member States' laws, as that would take volumes. Suffice it to say, however, that "class action" debates regarding representative actions have hit a high note recently in the wake of Dieselgate because many Europeans questioned why U.S. VW consumers seemed to obtain redress much more quickly than their European counterparts. Indeed, consumers in Germany, where VW is based, seem to be stuck in a litigation line—many *still* waiting for redress.

A. Injunctive Actions and Disjointed Member State Processes

European law generally does not have the same sort of "class actions" as exist under U.S. law. Instead, E.U. Directive 2009/22/EC, or the Injunctions Directive, allows for representative actions that call for injunctive relief.[87] In particular, the Directive allows for either "one or more public bodies specifically responsible for protecting [consumers'] interests," or an organization whose purpose it is to protect those interests, to bring an injunction against any "infringement" that goes against consumers' collective interests.[88]

83. *Id.* at 259–62.

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

85. *See generally* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L. J. 399 (2014) (concluding that "[t]he class action rule is not a bad thing; it is just not working, or it is working poorly.").

86. Cruden et. al., *supra* note 4, at 120–25.

87. Council Directive 2009/22, 2009 O.J. (L110) (EC).

88. *Id.*

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Accordingly, a consumer protection agency could bring an action seeking to stop a company from continuing to engage in deceptive practices. This is similar to the FTC enforcement actions in the U.S. where the FTC merely seeks to enjoin a company from selling defective goods, lying to consumers, or the like. However, the Directive has been criticized for failing to allow for representative actions for money damages. Indeed, injunctive relief can be quite disappointing for consumers who have already suffered financial harm and are not able to expend the time and cost to individually pursue litigation. This disappointment has led to Proposals for a new collective redress mechanism.[89]

This is especially true as Member States have practiced a limited and problematic patchwork of procedures. As an initial matter, most of the Member States only allow for collective action in cases where collective action is obviously needed, such as cases per the "leapfrogging" principle extending to various sectors of the European legal systems.[90]

The chart on the next page aims to encapsulate the areas where different Member States allow for collective action.

89. Philippe Métais & Elodie Valette, *Collective Redress In the E.U.: Past, Present, & Future*, LAW 360 EXPERT ANALYSIS (Mar. 22, 2019) https://www.law360.com/articles/1141551/collective-redress-in-the-eu-past-present-and-future; Philippe Métais & Elodie Valette, *One Step Closer to Group Actions (Collective Redress) in the E.U.*, WHITE CASE ALERT (Apr. 8, 2019), https://www.whitecase.com/publications/alert/one-step-closer-group-actions-collective-redress-eu.

90. Csongor István Nagy, *Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis*, SSRN 71, 85 (2019), https://ssrn.com/abstract=3440551.

91. *Id.* at 85–100. This chart was created by University of Missouri Law School student Kelli Reichert, based on the cited book. Special thank you and acknowledgment to Kelli Reichert for her fine work.

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How Collective Actions are Limited in Each Member State[91]

Country	General Application	Consumer Protection or Competition Matters[92]	Product Liability	Tort Liability	Discrimination	Environmental Protection or Energy	Personal Data or Privacy	Health Care	Employment	IP
Greece[93]		X								
Finland[94]		X								
Italy[95]		X								
Malta[96]		X	X							
Spain[97]		X			X*					
Poland[98]		X	X	X						
France[99]		X			X	X	X	X		
Hungary[100]		X				X			X	
Slovenia[101]		X				X			X	
Germany[102]		X								
England[103]		X								
Belgium[104]		X	X			X	X			X
Sweden[105]	X									
Portugal[106]	X									
Lithuania[107]	X									
Denmark[108]	X									

This chart depicts differences in coverage. At the same time, there are different requirements for class certification, and standing rules vary among Member States. This can include public entities, non–profit organizations, Member representatives,

92. Consumer Protection described using terminology other than "consumer protection": Consumer matters (Finland), Actions under the consumer code (Italy), securities (Slovenia), Code of economic law, enterprise breaches and contractual obligations, banking, insurance, credit card and payment services (Belgium). *Id.* at 84–87.

93. *Id.* at 85.

94. *Id*.

95. *Id*.

96. Nagy, *supra* note 90, at 86.

97. *Id*. (while Spain's Class Actions are limited to consumer protection, there is a section that includes matters pertaining to the equal treatment between men and women).

98. *Id*.

99. *Id*.

100. *Id.*

101. *Id*. at 87.

102. Nagy, *supra* note 90, at 87.

103. *Id*.

104. *Id*.

105. *Id*.

106. *Id.*

107. *Id*. at 88.

108. Nagy, *supra* note 90, at 88.

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SMEs, and more–again, depending on the Member State.[109] The Member States also have varied laws with respect to funding and liability for legal costs for collective actions. Rules differ among the Member States on whether the system is "opt–in" or "opt–out" such that those following an opt–in system tend to only bind the parties who joined in the action.[110] However, in Italy, those who did not opt in, while not bound, are typically precluded from future collective actions on the same subject.[111] So, they may still assert their claim as an individual, but not in a collective action.[112] Those who use an opt–out system apply *res judicata* to group members who do not opt–out.[113] This is like the U.S. system.

B. European Proposal for Representative Actions

Accordingly, the E.U. Member States follow a wide variety of rules regarding collective redress, and no one mechanism has emerged, which proved to be problematic in Dieselgate. Indeed, debates regarding collective action for pursuing consumer claims have loomed large in Europe.[114] The E.U. has been progressive in passing consumer protection legislation and curbing pre–dispute arbitration clauses in consumer contracts, as noted above. However, the E.U. has been highly skeptical of the "U.S. style" class action.[115]

In 2013, the European Commission adopted a Recommendation of Collective Redress that directed Member States to adopt a collective redress mechanism for violations of E.U. laws, but it lacked teeth and was careful to curb who could launch class actions.[116] Accordingly, the Recommendation was not binding and limited who would qualify to bring representative actions to non–profit entities or public authorities.[117] The Recommendation also suggested a "loser pays" system that excludes contingency fees.[118] The idea was to preclude birth of "class action law firms" that have become notorious in the U.S. for reaping large contingency fees per their "pets" on large–scale claims against "deep–pocket" companies.[119]

Over time, however, there seem to be renewed calls for changes that would allow for more robust collective redress in the E.U. To that end, the European Commission is considering a Proposal for a Directive on representative actions that would repeal the former directive in order to expand its scope and allow for financial redress.[120] The Proposal aims to further goals of the 2017 Fitness Check on the

109. *Id*. at 95–98.
110. *Id*. at 100–01.
111. *Id*. at 101.
112. *Id.*
113. *Id*. at 102.
114. Linklaters LLP, *Collective Redress within the European Union* (May 1, 2019), https://www.linklaters.com/en-us/insights/publications/collective-redress-2018/collective-redress-across-the-globe-2018/eu.
115. *See, e.g.*, Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L. J. 141, 141–42 (2010).
116. NAGY, *supra* note 90, at 71.
117. *Id.*
118. *Id*. at 72.
119. *Id.* at 72–100 (see the charts and variety of systems in the book available online).
120. *Commission Proposal for a Directive of the European Parliament and of the Council on Representative Actions for the Protection of the Collective Interests of Consumers, and Repealing*, at 1,

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Injunctions Directive, which evaluated its effectiveness and addressed shortcomings of the Injunctions Directive. The Commission found that the Directive was not being used due to its complexity, cost, and the limited results that it could get for affected consumers.[121] The Proposal aims to add "teeth" to the Injunctions Directive by allowing for financial compensation and expanding coverage to include other economic sectors where "a trader's illegal practices may affect a large number of consumers."[122] Nonetheless, the Proposal seeks to prevent "abusive litigation" by limiting the "qualified entities" that can bring these representative actions.[123]

Specifically, the Proposal seems to "take a page" from U.S. class action procedures in that it would allow for representative actions to obtain compensation, in addition to obtaining an injunction to stop or prohibit an infringement against the collective interests of consumers.[124] For example, the Proposal would allow a "qualified entity" to act on behalf of a group of consumers in France to obtain compensatory and injunctive relief against a company in Belgium engaging in deceptive trade practices.[125] Put another way, a qualified entity could bring an action against VW in Germany on behalf of consumers in Spain.

The Proposal would nonetheless limit who could bring these claims, which is a measure aimed to curb what some see as the abusive class action law firms in the U.S. The criteria to become a "qualified entity" will be determined by each Member State, and only qualified entities would be allowed to bring representative actions.[126] Qualified entities may also seek different remedies within one representative action, although the Proposal states that punitive damages should be avoided.[127] It also specifically states that it does not replace existing collective redress mechanisms where they exist within some Member States.[128]

At the same time, the Directive provides that litigation funding mechanisms must be fully transparent.[129] As noted above, class action funding is sometimes controversial in the U.S., which allows for "contingency fee" funding. Furthermore, the Proposal states that consumers should be informed of any ongoing representative action so that they can learn what they need to do if the action concerns them.[130] Additionally, the Proposal seemingly borrows from class action procedures in the U.S. and elsewhere by providing that qualified entities have power to seek discovery from traders when they hold exclusive information that is

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COM (2018) 184 final (Nov. 4, 2018) [hereinafter *Commission Proposal for the Protection of the Collective Interests of Consumers*].

121. *Id.* at 8. (Chapter 1 of the Directive lays out the subject matter, scope, and definitions. Chapter 2, article four declares that a qualified entity must (1) meet its Member State's criteria, (2) have a legitimate interest in ensuring Union Law covered by the Directive is complied with, and (3) be non–profit. Articles 5 and 6 states that consumers may obtain injunctions to infringements and appropriate redress measures).

122. *Id*. at 3.

123. *Id.* at 4.

124. *Id.* at 18.

125. *Id.* at 19.

126. *Commission Proposal for the Protection of the Collective Interests of Consumers*, *supra* note 120, at 20.

127. *Id.* at 21.

128. *Id.* at 22.

129. *Id*.

130. *Id.* at 23.

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necessary for a qualified entity's case.[131] For efficiency, one qualified entity may represent multiple qualified entities from different Member States in the same representative action.[132]

Again, this Proposal has not yet been adopted or implemented. Furthermore, it is undetermined how exactly the Proposal would work within each Member State. Indeed, it is quite unclear how the "qualified entity" requirement will work to prevent "frivolous actions." On the one hand, it may be overly restrictive in preventing law firms to act as "private attorneys general" as they do in the U.S. per FRCP 23. On the other hand, however, some question whether the "qualified entity" requirement will become *pro forma* and give way to arguably abusive litigation.

Additional critiques and concerns have emerged regarding the notice and proof of damage provisions of the E.U. Proposal. For example, commentators note that the Proposal specifies that qualified entities would be able to seek injunctions without having "to obtain the mandate of the individual consumers concerned or provide proof of actual loss or damage on the part of the consumers concerned or of intention or negligence on the part of the trader."[133] Additionally, Member States may not be required to comply with strict notice requirements where "consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them."[134] This means that E.U. consumers may be represented by "qualified entities" regardless of the consumers' knowledge or consent to the action—and possibly without any proof of damage.

Funding "transparency" rules are also quite unclear. Third party funding is growing in importance in the E.U., as third–party funders may essentially "front" the costs of litigation–a practice that could be seen as "betting" on lawsuits in the U.S. The Proposal seems to require that qualified entities leading representative actions must be "not for profit," but it is not clear whether this operating status would have an impact on the ability of these entities to seek and recover significant fees in the prosecution of these actions.[135] As for costs, the Proposal would not impact national rules regarding cost allocation, and there is some question whether forum shopping would ensue.[136] It may be that the Proposal would work in much the same way as the collective redress law that Germany implemented in November 2018.[137] Of course, Member States may go beyond the Proposal, as has been suggested in Italy, to cover more infringements and larger classes of people.[138]

131. *Id.* at 23.

132. *Commission Proposal for the Protection of the Collective Interests of* Consumers, supra note 120, at 27.

133. *Id.* at 28.

134. *Id.* at 29.

135. *See generally id*.

136. Kevin M. LaCroix, *Proposal for E.U. Collective Redress Mechanism Advances*, THE D&O DIARY (June 17, 2019), https://www.dandodiary.com/2019/06/articles/class-action-litigation-2/proposal-for-e-u-collective-redress-mechanism-advances/.

137. Anna Masser, *Commentary, Collective Redress in Europe: Comparing the European and German Framework*, JONES DAY (May 2019), https://www.jonesday.com/en/insights/2019/05/collective-redress-in-europe.

138. Anna Masser, *Commentary, Italy to Overhaul Class Actions*, JONES DAY (July 8, 2019), https://www.jonesday.com/en/insights/2019/07/italy-to-overhaul-class-actions?RSS=true.

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Overall, it remains unclear whether the E.U. Proposal would provide adequate means for consumers to pursue small dollar claims.[139] There is risk that the Proposal would welcome problematic attributes similar to the often–criticized U.S. class action regime. Furthermore, the lack of consistent application in different Member States is likely to leave consumers with the same "patchwork problems" that currently exist.[140] Indeed, the problem is that consumers in different countries get different deals, even when facing the same deceptive practices. We saw this with respect to Dieselgate. Accordingly, it is time to be creative in devising a global system for consumer redress with respect to deceptive trade practices and mass product claims.

IV. EMPOWERING CONSUMERS THROUGH ODR

Class and representative actions remain an important procedural mechanism for pursuing mass claims where many consumers have suffered the same harm. However, class actions are also subject to criticism and are unavailable for many consumers due to limitations per FRCP 23 or arbitration clauses embedded in consumer contracts. The prior Sections added to this complex picture through a comparative lens of class procedures from the U.S. vs. E.U. perspective. This also showed how consumers from every corner of the world may suffer similar harms but receive different redress, as in the Dieselgate case. At the same time, technology has given rise to ODR to expand access to remedies for consumer claims, especially lower–dollar claims.[141] This is because ODR makes it possible to obtain remedies without the cost and time involved in typical litigation. Accordingly, this Section will explore how ODR partially addresses the class action conundrum by providing an alternative to class actions for obtaining remedies on small dollar claims. Additionally, ODR could help serve the "private attorney general" function of class actions by providing a platform for reporting mass claims and shedding light on improprieties in an efficient manner.

A. Benefits of ODR for B2C Claims

Technology has revolutionized how we interact and what we expect in terms of access to information, assistance, and even redress. It is common to go online to review and research products. Therefore, it is no surprise that consumers expect to access remedies online. These expectations gave birth to ODR, which includes use of technology and computer–mediated–communication ("CMC)" to facilitate negotiation, mediation, arbitration, and other means of dispute resolution.[142]

139. Roderick Nieuwmeyer, *E.U. 'New Deal for Consumers' is Coming*, CMS (June 20, 2019), https://cms.law/en/nld/publication/eu-new-deal-for-consumers-is-coming.
140. *Id.*
141. *Id.*
142. Amy J. Schmitz, *There's an "App" for That: Developing Online Dispute Resolution to Empower Economic Development*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1, 1–45 (2018).

Many within the field are recognizing that ODR has enormous potential to resolve disputes faster and cheaper than traditional court processes.[143] Furthermore, ODR originally showed promise in typical B2C cases that involve low dollar amounts and fairly simple facts.[144] The web–based platforms also curb delays, eliminate travel costs, and generally aim to improve the accessibility of justice on consumer claims.[145] Indeed, there have been rumblings for some time that ODR could largely replace the need for class actions by moving low–dollar, high volume claims online.[146]

The early example of private ODR in the U.S. has been eBay's Resolution Center, which processes consumer claims related to website purchases free of charge.[147] For example, when a buyer does not receive an item or the item is not as promised on eBay, the buyer has the right to file an online complaint within thirty days after the latest estimated delivery date.[148] The seller then has three business days to respond in the Resolution Center.[149] If the seller does not respond or provide an adequate remedy, the buyer may ask eBay to assign an ODR neutral to arbitrate.[150] If necessary, eBay may enforce ODR determinations via PayPal, eBay's payment system provider, by setting aside a seller's funds.[151]

Since the launch (and success) of eBay's Resolution Center, ODR has expanded into the courts.[152] ODR may include a range of facilitative processes, but ODR in the courts has had special resonance with respect to small claims and other areas where individuals often lack legal representation.[153] In simple B2C small claims cases, for example, claimants often want a quick "click–n–settle" or online negotiation process that eliminates the need for travel or time off of work.[154] Furthermore, online "wizards" that help lead claimants through a process make it easy for self–represented litigants to fill out and file standard forms.[155] Online processes also allow for easy uploads of evidentiary documentation to obtain timely

143. Peter Cashman & Eliza Ginnivan, *Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions*, 19 MACQUARIE L. J. 39, 42 (2019).

144. *Id*. at 41.

145. *Id*. at 42.

146. *Id*. at 63.

147. Colin Rule, *Making Peace on eBay: Resolving Disputes in the World's Largest Marketplace*, ACRESOLUTION: THE QUARTERLY MAG. OF THE ASS'N FOR CONFLICT RESOL. (Fall 2008).

148. *Id.*

149. *eBay Money Back Guarantee Policy*, EBAY, https://www.ebay.com.au/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210 (last visited Feb. 17, 2019)

150. *Id.*

151. *Id.* (also giving both parties thirty days to appeal any determinations). *See also* Amy J. Schmitz, *Remedy Realities in Business to Consumer Contracting*, 58 ARIZONA L. REV. 213 (2016).

152. Amy J. Schmitz, *Expanding Access to Remedies through E–Court Initiatives*, 67 BUFFALO L. REV. 89, 104 (2019).

153. *Id.* at 93 (as noted in the cited article, there is a distinction between "e–courts" and "ODR." However, full discussion of the distinctions warrants another paper, and thus this Article will leave full discussion to another day).

154. *Id*. at 98 (the benefit of nimble ODR processes is that they allow system designers to "fit the forum to the fuss" and create a process best suited for the context).

155. *See* Philippe Gilliéron, *From Face–to–Face to Screen–to–Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 307–15 (2008) (noting use for consumer small claims); Public Roundtable on Dispute Resolution for Online Business–to–Consumer Contracts, 66 Fed. Reg. 7491 (Jan. 23, 2001); Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, 65 Fed. Reg. 18,032 (Feb. 16, 2000).

resolutions.[156] Moreover, translation programs give ODR the advantage of allowing for multilingual processes and communications.[157]

Utah, to offer just one example, has implemented an ODR program for small claims cases statewide.[158] The ODR Steering Committee was formed by the Utah Judicial Council in June 2016 to create means for improving access to remedies in small claims cases.[159] The ODR program follows a stepped process, beginning with "Education and Evaluation," which is a sort of "wizard" that provides information about the users' claims and possible defenses.[160] The second step opens a chat function on the site to allow parties to communicate about their dispute and potentially negotiate a settlement.[161] Parties who reach resolutions can then file their settlements online.[162] If parties are unable to negotiate a settlement on their own, they move to the third step of the process in which a facilitator helps mediate the dispute.[163] If parties are unable to reach resolutions within thirty–five days, they move to the fourth stage, in which a trial is arranged either online or in person.[164]

ODR also is expanding access to court in other countries. For example, Canada has been an ODR leader in developing its Civil Resolution Tribunal ("CRT") for resolving small claims in British Columbia.[165] The CRT process follows a stepped ODR process similar to that in Utah. It therefore begins with a problem–solving wizard that helps complainants assess their problem and decide the best option for how to proceed in solving the issue.[166] The wizard walks the complainant through a series of questions and provides guidance on likely options. If the user cannot resolve the issue through the wizard, then the process moves to an ODR portal, which begins with party–to–party negotiation and moves to mediation if that fails.[167] In the event that the parties are still unable to reach a mutually agreeable

156. *See, e.g.*, *Deliver Fast and Fair Online Dispute Resolution*, TYLER TECHNOLOGIES, https://www.tylertech.com/products/modria (last visited Feb. 2, 2020).

157. Melissa Conley Tyler, *115 and Counting: The State of ODR 2004*, PROCEEDINGS OF THE THIRD ANNUAL FORUM ON ONLINE DISPUTE RESOLUTION (2004) (noting that as early as 2004, eleven percent of ODR providers had multilingual capabilities).

158. Melisse Stiglich, *Utah Online Dispute Resolution Pilot Project*, NAT'L CTR. FOR ST. CTS. 3 (Dec. 2017), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwii9ZKj3KboAhVBHM0KHQSYBoYQFjAAegQIAhAB&url=https%3A%2F%2Fncsc.contentdm.oclc.org%2Fdigital%2Fapi%2Fcollection%2Fadr%2Fid%2F63%2Fdownload&usg=AOvVaw1UtJw6b_kAnG4ZBBnaVikO.

159. *Id.* at 6–7.

160. *Id.* at 8–9.

161. *Id.* at 8, 10–11.

162. *Id.* at 11.

163. *Id.*

164. Stiglich, *supra* note 158, at 11.

165. *The Civil Resolution Tribunal and Strata Disputes*, GOV'T OF BRITISH COLUMBIA (May 31, 2017), http://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal (furthermore, jurisdiction will expand significantly in 2019, as it will be able to resolve "accident claims" for personal injuries arising out of vehicle accidents occurring after April 1, 2019. Accident claims includes liability claims up to $50,000, as well as determinations whether injury is a "minor injury" and therefore subject to a cap on pain and suffering damages. This will also include disputes over accident benefits, such as medical and income benefits that insured British Columbians are entitled to, regardless of fault). Insurance (Vehicle) Amendment Act, B.C. 2018, b 20 (Can.); Civil Resolution Tribunal Amendment Act, 2018 B.C. b 22 (Can.).

166. *The CRT Process*, CIVIL RESOLUTION TRIBUNAL, https://civilresolutionbc.ca/tribunal-process/ (last visited Feb. 17, 2020).

167. *The Civil Resolution Tribunal and Strata Disputes*, GOV'T OF BRITISH COLUMBIA, http://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribun

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solution, an online adjudicator will make the ultimate decision following online or telephonic hearings.[168] Parties can access the portal on computers or mobile phones, with telephone or in–person hearings in rare cases.[169]

At the same time, the E.U. has incentivized development of ODR through its Regulation noted in the Introduction. The Regulation works in tandem with the ADR Directive to create an ODR platform, or single point of entry, for consumers and traders seeking to resolve disputes regarding online transactions through ADR/ODR.[170] Early reports suggest that the E.U. Portal has not gained great steam, mainly due to lack of awareness and different Member State implementations.[171] However, the appetite for using technology to resolve consumer disputes seems to be growing, and the platform has improved by integrating multiple languages and auto–translation.[172] Of the 24,000 cases submitted in its first year, 44% were resolved in the negotiation stage.[173] With the passing of the New Deal for Consumers policy in April 2018, more ODR processes are expected to roll out in Europe.[174]

Accordingly, momentum is building toward using ODR to expand access to remedies. Furthermore, this use of technology has particular resonance for these small dollar and less complex B2C claims, especially because consumers usually do not think about these problems as being "legal" in nature.[175] Consumers usually want easy access to assistance without needing to consult lawyers or physically go to court.[176] This creates a favorable environment for class actions, as consumers may obtain remedies by simply failing to "opt out" of a process usually instigated by class action attorneys (with the help of a lead plaintiff). However, the consumer may not get full redress, it may take years for the class action payment to come, and the lawyers may ultimately reap the greatest rewards. ODR, in contrast, allows for a more "self–empowerment" route to a remedy, which may be more satisfying in some cases for many consumers.

The time is ripe to look beyond collective or representative actions as the only viable means for obtaining remedies on small–dollar claims. Class actions should maintain a role in the larger universe of procedural vehicles for enforcing consumer protections. Yet, they need not be the only means, and may not even be the best for all cases or all consumers. Indeed, ODR may open a much–needed virtual door to

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al (last visited Feb. 17, 2020); *see also* CIVIL RESOLUTION TRIBUNAL, https://civilresolutionbc.ca (last visited Feb. 17, 2020).

168. *Id.* (these decision makers are independent decision makers appointed by government for fixed terms).

169. *Id.*

170. Commission Regulation 524/2013, 2013 O.J. (L 165/2) 18 (although the ADR Directive suggests that consumers' access to ADR/ODR should be free or low cost, it does not specify who will fund developing and maintaining the platform or related services); Council Directive 2013/11, 2013 O.J. (L 165/67) 41 (E.U.) (instead, it encourages private funding and leaves utilization of public funds to member states' discretion).

171. Council Directive 2013/11, 2013 O.J. (L 165/63) 6 (E.U.).

172. Cashman & Ginnivan, *supra* note 143, at 47.

173. *Id*. at 48.

174. *Id*.

175. Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. ARK. LITTLE ROCK L. REV. 779, 787–88 (2012) [hereinafter Schmitz, *Building Bridges*]; Amy J. Schmitz, *"Drive–Thru" Arbitration in the Digital Age: Empowering Consumers through Regulated ODR*, 62 BAYLOR L. REV. 178, 185 (2010) [hereinafter Schmitz, *Drive–Thru*].

176. *See* Jean Braucher, *An Informal Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1410 (1985).

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consumer remedies on a global level, without the "baggage" attached to discussions around class actions.

B. Establishing a Trusted Platform

With this backdrop, it seems logical that international efforts would lead to development of a unified ODR system for mass consumer complaints. Government agencies could work with consumer groups and private providers to set up a portal that allows consumers to file claims for free or for a very low fee.[177] Government regulators such as the FTC and CFPB in the U.S. could also work with their international counterparts to educate the public about this ODR platform and establish a government–approved Trustmark that companies could post if they abide by the ODR portal and comply with resulting settlements and judgements.[178]

Of course, developing and adopting a global ODR system is not that easy. The demise of UNCITRAL Working Group III, noted above, makes that very clear.[179] However, the talks broke down mainly due to a difference of opinion regarding enforcement of pre–dispute arbitration clauses and the inclusion of binding arbitration procedures through the online process. This became known as the debate between Track 1 and Track 2.[180] The United States favored Track 1 because it allowed for enforcement of pre–dispute arbitration agreements, whereas the E.U. Member States and other countries championed Track 2 because it did not allow for such binding procedures.[181] Furthermore, debates regarding the feasibility of a global chargeback system muddied discussions due to variations in payment systems and related complexities.[182] Nonetheless, it was understood that a global system for ODR would be beneficial for companies and consumers.[183]

Accordingly, it seems that renewed discussions with a refined focus on mass B2C claims, without the distractions of chargeback or arbitration debates, could be successful.[184] Again, consumers seek quick redress and do not have the time or money for a lengthy process which also requires them to seek enforcement for any reward obtained.[185] The hope remains that leaders from around the world will continue to discuss ideas and finally bring a global ODR system to fruition.[186]

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177. AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017) (setting forth specifics regarding ideas for a global ODR system). In the U.S., the CFPB could perhaps lend a helping hand in establishing such a system by adding an ODR feature to its "complaints" portal. Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

178. "Trustmarks" are indications that something is "approved" by an official entity of some kind. For example, the Better Business Bureau's rating of a company has been called a Trustmark.

179. *See* U.N. Comm'n on Int'l Trade Law, *supra* note 21.

180. *Id.* at 2.

181. *Id.* at 4.

182. The author was an appointed expert to the Working Group for a meeting during this time.

183. U.N. Comm'n on Int'l Trade Law on the Work of its Thirty–Third Session, U.N. Doc. A/CN.9/WG.III/WP.140 (2015) [hereinafter U.N. Comm'n on Int'l Trade Law].

184. *See* Mirèze Philippe, *ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & E.U. Regulation on ODR*, 1 INT'L J. ONLINE DISP. RESOL. 57, 68 (2014).

185. *Id.* at 67.

186. *See* U.N. Comm'n on Int'l Trade Law, *supra* note 183.

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The first step would be to bring together international leaders to begin the process of creating and maintaining the global ODR platform. This could involve meetings among consumer protection agencies interested in contributing toward the cost of establishing a system, particularly because the system would further their efforts with relatively minimal costs. It is expensive and inefficient for individual agencies to each launch their own actions. In contrast, a collectively created ODR platform would allow for economies of scale and give individuals power to seek redress without need for direct representation by an agency or law firm, in most cases. As a result, consumer protection agencies would have to do less "work" in launching actions on consumers' behalf, as consumers would have the power to seek their own remedies without the cost and time of traditional litigation.

Additionally, companies may be inclined to contribute a small fee toward the maintenance of this ODR platform if the fee would earn the right to post a "Trustmark" indicating that the business abides by the new system. This "Trustmark" would benefit the companies by attracting customers.[187] Buyers feel more comfortable purchasing from cross–border merchants when they know that they can get a remedy if there are problems with the purchase. For example, companies like Amazon and eBay have enjoyed financial benefits from their investment in ODR.[188] Providing means for a remedy builds goodwill, which is usually any retailers' best asset.[189] EBay learned that consumers who had complaints that were quickly resolved were actually more loyal than those who *never* had complaints.[190]

Again, there is no question that establishing a global ODR platform or mechanism is not an easy task. If it were, UNCITRAL Working Group III would have done the job. However, all hope is not lost; momentum toward ODR is growing, especially with respect to small B2C claims. It seems that consumer protection agencies from around the globe should join forces to create a contextually tailored system that "fits the forum to the fuss" with respect to B2C claims. Consumers would benefit from access to remedies through simple and streamlined procedures, while companies would benefit from an internationally accepted Trustmark system for ODR that would help consumers feel comfortable purchasing from companies who provide ethical and fair ODR.[191] The following

187. Steven J. Cole & Charles I. Underhill, *Fifteen Years of ODR Experience: The BBB Online Reliability Trust Mark Program*, 43 UCC L. J. 443, 446 (2010) (this could mimic BBB's "trust mark" program).

188. *See, e.g.*, Rule, *supra* note 147, at 1; Louis F. Del Duca, Colin Rule, & Kathryn Rimpfel, *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ON ARB. & MEDIATION 204 (2014); Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress*, *in* ONLINE DISPUTE RESOLUTION: THEORY & PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 163, 175–84 (Mohamed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

189. Rob Enderle, *eBay vs. Amazon: An Interesting Lesson in Customer Care*, IT BUS. EDGE (Jan. 19, 2012), https://www.itbusinessedge.com/cm/blogs/enderle/ebay-vs-amazon-an-interesting-lesson-in-customer-care/?cs=49557; RESOLUTION CTR., EBAY, https://resolutioncenter.ebay.com (last visited Feb. 18, 2020); DISPUTING TRANSACTIONS, AMAZON, https://pay.amazon.com/us/help/201754740 (last visited Feb. 18, 2020); BUYER DISPUTE PROGRAM, AMAZON, https://pay.amazon.com/us/help/201751580 (last visited Feb. 18, 2020); RESOLVING DISPUTES, CLAIMS, & CHARGEBACKS, PAYPAL, https://www.paypal.com/us/webapps/mpp/security/resolve-disputes (last visited Feb. 18, 2020).

190. Tibbett L. Speer, *They Complain Because They Care*, 18 AM. DEMOGRAPHICS 13 (May 1, 1996) (noting "grousers are likely to remain loyal" if they are happy with resolution of their complaints); *see also* Del Duca, *supra* note 188.

191. Schmitz, *supra* note 142, at 42.

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Subsections add further thoughts on security, fairness, accessibility, and transparency for such an ODR process.

C. Ensuring Security and Privacy

Privacy and security are top of mind when it comes to ODR.[192] Consumers will not trust a process that fails to safeguard their information, or worse yet, allows companies to profit from information shared. Indeed, the E.U. has been more proactive than the U.S. in protecting privacy through the General Data Protection Regulation ("GDPR"), which has been called "the most important change in data privacy regulation in 20 years."[193] The GDPR was implemented in May 2018 and governs how companies safeguard the personal data of E.U. citizens.[194] Unlike other E.U. Directives, Member States must uniformly interpret and apply this Regulation.[195]

Accordingly, the GDPR has had sweeping effects on privacy and security of consumer data in the E.U. because it creates consistent regulations and avoids differences among countries. Furthermore, "any company that markets goods or services to E.U. residents, regardless of its location, is subject to the regulation."[196] This means that companies in the U.S., and all over the world, must comply with the GDPR when selling to E.U. citizens.[197] Accordingly, any ODR platform should comply with the GDPR at a minimum.

Specifically, the GDPR requires that consent be clear, intelligible, and in plain language for companies to place "cookies" on their websites and use consumers' data.[198] The ODR platform must therefore make any "cookies" known. It also must have mechanisms in place for notifying users of any data–breaches and establishing fines for any companies found to have caused a breach.[199] The GDPR sets greater fines for non–compliance—up to four percent of global turnover or twenty–million Euro, whichever is greater—that should significantly decrease misuse of consumer data.[200] ODR regulations could add additional "teeth" to these fines by requiring that companies lose the privilege to use the platform or post the newly established ODR Trustmark if found to have been negligent in guarding consumer data.

Additionally, the E.U. has recognized the importance of privacy and security in its ADR Directive and ODR Regulation in that it requires Member States to ensure that ADR entities make publicly available clear and easily understandable information on their compliance with Directive standards, including attention to

192. *Id.* at 42–43.

193. *See* Juliana De Groot, *What is the General Data Protection Regulation? Understanding & Complying with GDPR Requirements in 2019*, DIGITAL GUARDIAN (Dec. 2, 2019), https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection; *What is GDPR, the E.U.'s New Data Protection Law?*, GDPR https://gdpr.eu/what-is-gdpr/ (last visited Feb. 18, 2020).

194. De Groot, *supra* note 193.

195. *Id.*

196. *Id.*

197. *Id.*

198. Luke Irwin, *How the GDPR Affects Cookie Policies*, IT GOVERNANCE (Sept. 15, 2017), https://www.itgovernance.eu/blog/en/how-the-gdpr-affects-cookie-policies.

199. *Art. 34 GDPR, Communication of a Personal Data Breach to the Data Subject*, INTERSOFT CONSULTING, https://gdpr-info.eu/art-34-gdpr/ (last visited Feb. 18, 2020).

200. *GDPR Penalties & Fines*, IT GOVERNANCE, https://www.itgovernance.co.uk/dpa-and-gdpr-penalties (last visited Feb. 18, 2020).

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privacy and security.[201] "[T]his Directive establishes a set of quality requirements which apply to all ADR procedures carried out by an ADR entity which has been notified to the Commission."[202] Furthermore, the Directive requires that designated competent authorities monitor these ADR procedures in order to advance consumers' access to high–quality, secure, effective, and fair out–of–court redress mechanisms no matter where they reside in the Union.[203]

Similarly, a global ODR platform must have extremely strict encryption and security standards and preclude misuse or sale of consumer information. There also should be regular outside audits of the system, as well as "monitoring" along the lines of what already exists with respect to the E.U.'s ODR Regulation. The newly created system's monitoring should be more centralized and robust, however, to minimize the consistency problems that currently plague the E.U. platforms.

Again, there are hurdles to overcome in establishing a secure and safe ODR platform, as evidenced by the demise of UNCITRAL Working Group III.[204] However, UNCITRAL Working Group IV recently expressed a desire to consider the role of ODR in its examination of cloud computing contracts and identity management.[205] Furthermore, ODR has become more sophisticated, user–friendly, and "mainstream" since 2016. Technologists are also continually creating new means for ensuring data safety, and there is no reason to believe that ODR would be less "safe" than any other online process. Let's face it: consumer data is never completely safe. Moreover, there is a clear need for global ODR in cases that transcend boundaries and require international cooperation to protect similarly situated individuals throughout the world. Imagine if there were a global ODR platform in the VW case. . . Consumers throughout the world would have been able to obtain redress more quickly, and do so on equal playing fields. At the same time, regulators throughout the world would have been able to coordinate their efforts in detecting and shutting down VW's deceptive behaviour.

D. Alerting the Public and Promoting Transparency

As noted above, a key function of class actions is to "shed light" on consumer protection issues through class notice and attendant press. For example, as consumers began to join forces against VW, news broke about VW's manipulation of emissions testing. If all the consumers in the U.S. were subject to arbitration clauses in their VW purchase contracts and could not join class actions, then they may have been pushed into private arbitrations, and the information regarding VW's deception may not have become public as quickly. In fact, one of the features that makes class actions controversial is their power to create "press" that may prod

201. Council Directive 2013/11, art. 7, 2013 O.J. (L 165/73) 1(b) (E.U.).
202. Council Directive 2013/11, 2013 O.J. (L 165/67) 37 (E.U.).
203. Council Directive 2013/11, art. 2, 2013 O.J. (L 165/70) 3 (E.U.).
204. *See generally* U.N. Comm'n on Int'l Trade Law, *supra* note 183.
205. U.N. Comm'n on Int'l Trade Law on the Work of Its Fifty–Sixth Session, ¶ 33, U.N. Doc. A/CN.9/WG.IV/936 (2018) ("With respect to section M, the Working Group agreed to add a subsection on online dispute resolution (ODR) in the light of the relevance and importance of ODR to resolution of disputes arising from cloud computing transactions and taking into account UNCITRAL's work in that area.").

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companies into large settlements, even when there is not clear liability, simply because companies fear the bad press.[206]

Nonetheless, class actions are an important vehicle for promoting transparency.[207] Public trials typically ensure accountability through professional and media scrutiny, but more importantly, they encourage confidence in the judicial system.[208] In contrast, ODR fails to live up to traditional courts in this regard.[209] However, technology provides a democratizing effect by increasing public participation.[210] More people will report claims if they can do so on their mobile device without time or travel.[211] Furthermore, ODR platforms lessen disparity related to education, experience, and cultural differences by presenting rules and forms in plain language and incorporating AI to evaluate and direct party claims toward resolution.[212] More importantly, the ease with which user feedback can be collected online allows for ODR to continually innovate and improve.[213] For example, asynchronous messaging receives positive feedback because it allows parties more time to compose responses.[214] Accordingly, ODR platforms now incorporate more asynchronous messaging instead of assuming people want synchronous video or chat features.

Class actions' transparency should not be overstated because publicity generally relies on class action attorneys taking on the cases. In other words, a case must be sufficiently large to be lucrative. In contrast, a global ODR portal for consumer claims could lead to public awareness and coordinated enforcement actions through a consumer–led "bottom up" approach. In other words, consumers would have power to bring claims with little cost, freeing them from relying on a law firm to take on the case as a class action. Also, if international regulators and ODR policymakers joined forces to create an ODR portal coupled with a Trustmark, then companies would be on notice that there is an easy means for consumers to get redress if the company is caught. This would hopefully inspire good behaviour (or, at the very least, disincentivize bad behaviour). At the same time, companies that do not abide by the rules of the ODR portal would not enjoy goodwill generated from posting the Trustmark. The existence of the Trustmark signals increased consumer protection.

Additionally, this ODR portal could alert the public and regulators of purchase problems through inclusion of a "trip wire" that would alert consumers about recurring claims. In other words, a product or merchant would be "red flagged" once a certain number of similar claims were filed regarding that product or against that particular merchant. This red flag could lead to public and regulator notice, especially where health or safety are at risk. This would promote public awareness about a danger that may otherwise remain private due to the proliferation of pre–dispute arbitration clauses and class action waivers in the U.S. It also would

206. Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 446 (2003); Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878 (2017).
207. Cashman & Ginnivan, *supra* note 143, at 55.
208. *Id*.
209. *Id*. at 56.
210. *Id*.
211. *Id*. at 52.
212. *Id*. at 61.
213. Cashman & Ginnivan, *supra* note 143, at 62.
214. *Id*. at 60.

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augment efficiency by funnelling the most important cases to regulators, saving them the time and costs of launching broad investigations or remaining in their territorial silos.

In the VW case, for example, there would have been a worldwide alert of VW's deceptive acts as soon as the volume of claims hit a certain level. The level could be based on a percentage of total sales so that sellers are not disadvantaged by their volume. For example, it could be set at 10% of sales (or another acceptable percentage) so that concerns are not raised simply because a merchant sells more products naturally face more claims. Red flags would only go up after it appears that there is an inherent product or merchant problem that impacts a large percentage of a company's sales.

In the VW case, an ODR "trip wire" would have likely caused alarm more quickly than the time it took to file lawsuits and launch government actions or arrange legal representation. At that point, regulators could have immediately started coordinated enforcement efforts and systems could have been in place for establishing redress options. Consumers would be empowered to obtain redress on their own through such a simple online process, which could cut out inefficiencies and costs that otherwise plague litigation.[215]

This trip wire idea may not be appealing to companies, as it could arouse unwanted regulatory action. However, companies could also benefit from the program if properly conceived. For example, the ODR regulation could provide a "safe harbor" that would save a company that posts the Trustmark from paying large regulatory fines, as is otherwise the case with respect to many government enforcement actions, if the company immediately provides redress and addresses claims that hit the "trip wire" level. Additionally, as noted above, use of the ODR process could attract cross–border customers and ease companies' overall dispute resolution costs, thereby augmenting revenue and lowering overhead costs. Compliant, "good guy" merchants would benefit overall by gaining customers and avoiding costs and bad press of class actions.[216]

E. Banking on Efficiency

Notably, technology has already gained importance for improving efficiency of resolving mass claims. Successfully incorporating claims management systems into the ODR platform would therefore bank on this efficiency, helping curb claims processing costs and boost consumer pay–outs. At the outset of litigation, online platforms allow class members to easily sign up or opt out, execute agreements for representation, upload documents regarding their individual claim, and stay informed with updates or newsletters.[217] Often, attorneys file pleadings, evidence,

215. Of course, these are simply initial thoughts and there are many details for later determination. *E.g.*, SCHMITZ & RULE, *supra* note 177 (proposing an online remedy system to expand consumers' access to remedies and to revive corporate responsibility in consumer contracting).

216. Another idea for using technology to protect the public from deception is to use blockchain for tracking goods. Margaret D. Fowler, *Linking the Public Benefit to the Corporation: Blockchain as a Solution for Certification in an Age of "Do–Good" Business*, 20 VAND. J. ENT. & TECH. L. 881, 881–917 (2018) (arguing that blockchain could be used to standardize certification requirements and verify compliance through transparent tracking).

217. Cashman & Ginnivan, *supra* note 143, at 64.

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and other court documents electronically.[218] The volume of documents to be reviewed in mass claims requires extensive time and money, but online databases allow the use of key word searches and Boolean operators to find relevant information faster.[219] With the increasing use of predictive coding and AI with ODR, it is clear that an online system would reduce the document pool and simplify mass claims resolution.[220]

Currently, some class action law firms continue with antiquated paper systems. However, there is a movement toward online claims processing, making it logical to move claims online from the start.[221] For example, the Australian VW class action involves five named plaintiffs, but if successful, 90,000 other claims will need to be evaluated.[222] Digital technologies can be implemented to expedite recovery and reduce overall costs.[223] Online systems also can help with evaluating claims on an individual basis in light of proof, injury, causation, and other substantive legal issues.[224] Scholars in Australia have noted how the Dalkon Shield Claimants Trust[225] and the Vioxx settlement[226] serve as examples of how ODR technology reduces the time and cost associated with claims processing.[227]

Shareholder cases also provide an example use case for electronic claims management. A sophisticated ODR platform can utilize multivariate statistical methods to determine an inflated price, for example, as well as market factors that may have had an impact in determining damages with respect to shareholder claims.[228] The Merck settlement[229] included an online platform with mathematical tables, enabling shareholders to calculate their estimated losses.[230] Visa and Mastercard also utilized computer–based processing in their recent settlement for charging excessive fees.[231] Again, technology could be part of the process at the outset and need not wait until a class action law firm or claims manager decides to use technology for claims management. ODR from the outset would be significantly faster and more cost efficient than traditional methods used in class actions to evaluate and process individual claims.[232] Of course, that does not mean that ODR should be the only door to remedies. Instead, this Article merely suggests renewed consideration of ODR's special import for mass consumer claims.

218. *Id*.
219. *Id*. at 65.
220. *Id*. at 61.
221. *Id*. at 77–78.
222. *Id*. at 70.
223. Cashman & Ginnivan, *supra* note 143, at 78.
224. *Id*. at 71.
225. *Id*. at 74.
226. *Id*. at 75–78.
227. *Id*. at 75.
228. *Id*. at 77.
229. Cashman & Ginnivan, *supra* note 143, at 77.
230. *Id*.
231. *Id*.
232. *Id*. at 78.

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F. Addressing Accessibility and Honoring Choice

The rush to digitize has hit breakneck speeds as access to the Internet has become a basic "necessity" in modern society. At the same time, ODR is gaining steam as technology becomes a "fourth party" in dispute resolution. Technological filtering and decision–tree analyses built into ODR help guide individuals through a resolution process and structure their communications. Technology also may use predictive analytics to essentially "nudge" parties toward fair settlements.[233] ODR also may ease social pressures of in–person discussions, especially when one fears how she will be perceived due to race or gender.[234] This is why ODR may help empower marginalized groups who fear stereotypes or biases based on appearance, voice, or accent.[235] Additionally, smartphones have helped democratize the Internet and narrow the digital divide.[236]

However, that does not mean that ODR is the answer for everyone and all disputes. Empathy fostered through in–person communications still plays a role in dispute resolution. Indeed, some individuals will never feel comfortable seeking remedies through an online process. That is why in–person remedy systems must remain accessible. This is especially true for older adults that did not grow up with the Internet. Indeed, a "digital divide" remains in terms of consumers' differential access to and comfort with the Internet. This is most pronounced with respect to older adults and those with lower levels of education.[237]

At the same time, policymakers and businesses must consider ways to expand free or low–cost Internet access for vulnerable groups.[238] They also should expand access to the Internet in rural areas and create places where individuals can go to use an ODR process with assistance. This may be particularly helpful for older adults who are overwhelmed with the idea of filing a claim online. For example, public libraries and senior centers often offer free computer labs, which could include kiosks for assistance with filing online claims. Additionally, public facilities, consumer protection agencies, and businesses that use ODR also could provide "ODR stations" set up with free Wi–Fi access for consumers to file claims online.

In fact, the Legal Education Foundation ("LEF") has suggested similar considerations in the wake of the seeming rush to digitize courts in the U.K.[239] As the U.K. is closing courthouses and swiftly moving cases online, the LEF has

233. Ayelet Sela, *e–Nudging Justice: The Role of Digital Choice Architecture in Online Courts*, 2019 J. DISP. RESOL. 127, 127–40 (2019).

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

235. *Id.* at 125–26.

236. Kathryn Zickuhr & Aaron Smith, *Home Broadband 2013*, PEW RESEARCH CTR. (Aug. 26, 2013), http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

237. Thom File, *Computer & Internet Use in the U.S.*, U.S. CENSUS BUREAU 3 (May 2013), https://www.census.gov/prod/2013pubs/p20-569.pdf.

238. *See, e.g.*, Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES (May 28, 2015), https://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html (discussing plan to expand access to the internet for the poor).

239. Natalie Byrom, *Digital Justice: HMCTS Data Strategy & Delivering Access to Justice Report & Recommendations*, LEGAL EDUC. FOUND. 2–20 (Oct. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF.

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proposed the need for an assisted digital program to help those who lack the digital skills to engage in the new process, and the continued existence of a reformed paper channel that is simple and easy to use.[240] In other words, all physical doors to the courthouse should not be closed. Furthermore, it is essential to gather and study data with respect to ODR programs in order to examine how people are progressing through the system, when they are leaving, and what their outcomes are.[241] This approach would allow researchers to monitor for patterns of attrition at different stages to see if vulnerable persons are receiving different outcomes.[242] Again, any ODR process should adapt and improve based on data. This is a key attribute of ODR, as the nimbler cousin of traditional in–person dispute resolution procedures.

V. CONCLUSION

Consumer organizations and policymakers logically focused on comparative analysis of representative, or class action procedures in the wake of Dieselgate. This helped shed light on consumers' need for class or other means for accessing remedies with respect to relatively low dollar claims without the assistance of class procedures. The discussion also showed how consumers may not receive the same remedies when they suffer the same harms. This differential access to remedies has caused some to question why the U.S. consumers obtained remedies against VW before their European counterparts. This helped fuel the call for collective redress provisions in the E.U.

However, the comparative conversation also highlighted a "class action conundrum": class actions allow consumers to join forces to obtain remedies with little cost and effort, but they have (rightfully or wrongly) earned a reputation for padding the pockets of lawyers and forcing companies into possibly unfair settlements. Of course, that is an oversimplification of the class action debate, but suffice it to say that class action procedures come with baggage.

Accordingly, the conversation should include consideration of ODR. ODR has the capacity to empower consumers to obtain remedies without the cost, time, stress, and other hindrances of individual litigation. This makes it more economical to assert smaller dollar claims, and "wizards" built into ODR systems often eliminate need for expensive lawyers. At the same time, a "trip wire" and "Trustmark" could bolster the ODR process as a consumer protection mechanism that would benefit consumers, companies, and regulators alike.

Nonetheless, ODR designers must be careful to safeguard privacy and security and promote accessibility.[243] Cost and time savings are important ODR goals, but they should not overshadow fairness and justice.[244] Policymakers must work with providers in establishing best practices for any international ODR platform and require companies to abide by these practices in order to enjoy the benefits of posting a monitored ODR Trustmark. The International Center for Online Dispute Resolution ("ICODR") has already articulated principles and standards for ODR

240. *Id.* at 12.
241. *Id.*
242. *Id.*
243. Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 616 (2014).
244. *Id.* at 628, 643.

that should serve as a starting point.[245] Moreover, the conversation is growing as the National Center for Technology and Dispute Resolution, American Bar Association, National Center for State Courts, PEW Charitable Trust, Cyberjustice Laboratory, and many more stakeholders continue to discuss how to best design and assess ODR with a goal toward fair and efficient justice that "fits the forum to the fuss."[246]

245. The following list of ODR Standards is taken directly from the International Council for Online Dispute Resolution at *ICODR Standards*, ICODR, http://icodr.org/index.php/standards/ (last visited Feb. 19, 2020), and were based on the ODR Ethical Principles put forth in Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT'L J. ON ONLINE DISP. RESOL. 12, 12 (2016). *See also Ethical Principles for ODR Initiative*, NCTDR (2016), http://odr.info/ethics-and-odr/.

246. *See* NAT'L CTR. FOR TECH. & DISPUTE RESOLUTION, www.ODR.info (last visited Mar. 18, 2020), and sources cited therein for more information. *See also* THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION & THE FUTURE OF CONSUMER PROT., www.newhandshake.org (last visited Mar. 18, 2020). This author is also the Co–Chair of the ODR Task Force seeking to set standards for ODR in various contexts.