

## Are Online Dispute Resolution Systems the Answer?

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Date : October 26, 2017

Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 **Ariz. L. Rev.** 213 (2016), available at [SSRN](#).

How should the law respond to the plight of consumers who have little viable recourse when a business breaches their contract? For an overview of this problem and a review of the potential strengths and weakness of online dispute resolution (ODR), there is no better article to read than *Remedy Realities in Business-to-Consumer Contracting* (*Remedy Realities*), Professor Amy Schmitz's contribution to a symposium in honor of the late Professor Jean Braucher, herself a leading writer about and advocate of consumer protection in business to consumer contracts.

Professor Schmitz's article first reviews the reasons consumers find themselves with limited recourse when disappointed with their business's performance, including take-it-or-leave-it form contracts that disclaim warranties, limit remedies, and require often one-sided arbitration and a waiver of class actions. In addition, consumers "lack the time, knowledge, or patience" to pursue their claims and are beset with business strategies that deter remedy seeking. Although legal literature has well-documented these problems, Schmitz's article sets forth a nice summary and adds important data, such as the waning of class arbitration in the years subsequent to the U.S. Supreme Court's curious (in my view) decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which reinforces arbitration and class waivers. *Remedy Realities* does much more than this, however. Inspired by Professor Braucher's work on consumer protection, Schmitz evaluates in some detail how ODR may ameliorate the consumers' plight.

Schmitz is not content with existing complaint portals in part she says because of their unreliability and lack of manageability ("it has become nearly impossible to navigate the largely unmonitored review and complaint websites") and their lack of teeth in resolving disputes. She argues that ODR has more potential. As an example, she sets forth eBay's dispute procedures, which allow a buyer to file an online complaint. If the seller does not respond satisfactorily, eBay can assign an ODR "neutral" to decide the dispute. Further, eBay can use PayPal to hold back funds and enforce the neutral's determination. eBay's resolution procedures, as well as other ODR entities, "use online processes to end disputes without need for the travel, stress, inconveniences, and other costs of traditional . . . resolution measures." (Schmitz points out, however, that eBay's user agreement also includes a binding arbitration clause if resolution fails.)

Although a proponent of ODR, Schmitz isolates some of the hurdles to success of the process. One important concern is potential consumer reluctance to participate in ODR in part because of privacy concerns. Further, she points out that ODR may be costly for businesses and therefore trigger price increases. The process might also diminish the business practice of allowing automatic returns. In addition, Schmitz notes and documents the problem of "differential access to the Internet" among consumers with complaints. Finally, and perhaps most important, taking a lesson from some arbitration procedures, she observes that ODR entities may be partial to the businesses that retain them.

Although Schmitz discusses possible solutions to these problems, the reader may come away with some doubt about the potential of ODR, at least as a complete solution to the problem of consumer rights. For example, Schmitz writes that the problem of privacy calls for designers of ODR systems to develop "robust means for protecting privacy and encrypting data." The problem of business partiality, she explains, requires "collaboration with governmental regulators . . . to ensure system fairness," including rules to review and accredit ODR programs. The reader may question whether Schmitz is asking a lot and is too optimistic about the potential of designers and government to achieve these goals. Perhaps ameliorating the problem, ODR entities and regulators can look to Europe where ODR is

popular and successful and pattern their processes accordingly.

Additional possible solutions, perhaps working in tandem with ODR, come to mind. For example, the New York Times recently [reported](#) that the Consumer Financial Protection Bureau adopted a new (but controversial) rule that bars financial firms from prohibiting class actions. Also, I wonder if Schmitz is too pessimistic about the potential of complaint portals. In fact, she argues that businesses should favor ODR in part because ODR will “hinder consumers from spreading negative publicity on social media.” Another possibility is a more formal role for watchdog websites that can monitor business terms, collect additional information about business practices, and spread the word about worrisome terms and practices.

No subject today is probably more important than technology’s effect on legal and social issues. Scholars working in this area should read *Remedy Realities*. In a follow-up article that has just surfaced on SSRN, [The New Handshake: Where We Are Now](#), Schmitz and her coauthor Colin Rule, pursue the effect of technology on consumer rights. They see problems: “The internet has... usher[ed] in a new age of consumer confusion and disempowerment.” In *Remedy Realities*, however, Schmitz sees a potential solution in ODR.

Obviously, I have only scratched the surface here in explaining the problems consumers face in pursuing their rights and in the potential of ODR. For an excellent discussion that helps move the ball forward, read Amy Schmitz’s article, *Remedy Realities in Business-to-Consumer Contracting*.

Cite as: Robert Hillman, *Are Online Dispute Resolution Systems the Answer?*, JOTWELL (October 26, 2017) (reviewing Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 *Ariz. L. Rev.* 213 (2016), available at SSRN), <https://contracts.jotwell.com/are-online-dispute-resolution-systems-the-answer/>.