WHY A NEW DEAL MUST ADDRESS THE READABILITY OF U.S. CONSUMER CONTRACTS

Michael L. Rustad†

U.S. companies are increasingly drafting consumer contracts that are complex and unreadable, thus making it difficult for many Americans to comprehend terms of use that apply to goods and services. Many U.S. companies are creating terms of use that are, in effect, rights-foreclosure schemes. Many consumer agreements cap damages at a nominal amount, disclaim all warranties, limit remedies, and impose mandatory arbitration clauses and class action waivers. U.S. courts enforce these unfair mass-market contracts with few exceptions. My proposal for a New Deal for Consumer Contracts, as described in this Article, would impose a more exacting readability standard, enforcing agreements only if they were drafted at a reading level of the eighth grade or below in order to protect consumers against inadvertently agreeing to unfair standard contract terms such as unfair choice of law and forum clauses, limits on recovery, predispute arbitration, and disclaimers of all significant remedies. The New Deal for Consumer Contracts would invalidate unfair and deceptive consumer clauses—a reform that would synchronize U.S. consumer law with the mandatory consumer laws of the twenty-seven countries of the European Union.

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† Thomas F. Lambert Jr. Professor of Law at Suffolk University Law School, Co-Director of Suffolk's Intellectual Property Law Concentration, and the 2011 chair of the American Association of Law Schools Torts & Compensation Systems Section. I am grateful for the support of the Robert L. Habush Endowment for this Article. I would also like to thank Sue Steinman of the Association of Justice for her continued support, and Seth Markley and Chryss J. Knowles for their editorial suggestions. I have additional appreciation for the editorial and research assistance of Hunter A. Becker, Ivette Cuenod Lorenzo, Layth H. Hert, and Elizabeth P. West, my Suffolk University Law School students. Elizabeth P. West assembled the lists of the five samples in Excel sheets that were converted to SPSS files for statistical analysis. Finally, I greatly appreciate the continued support from Suffolk University Law School Dean Andrew Perlman and Associate Dean Pat Shin.

INTRODUCTION

Online agreements deployed by leading U.S. companies are not only unreadable to the average American but are also significantly imbalanced to the detriment of the consumer. Microsoft's thirty-two page standard form agreement is difficult to read with a Flesch Reading Ease (FRE) score of 58.8 written at the ninth-grade level, a full grade level beyond what the average American adult is able to grasp.[1] Microsoft's Service Agreement asserts that consumers are bound to their onerous terms by simply creating an account or "by continuing to use the Services after being notified of a change to these Terms."[2] Microsoft's browsewrap-type agreement predicates contract formation on merely using the service.[3]

Microsoft asserts the unilateral right to modify its terms of use (ToU)[4] at any time,[5] and their "Limitation of Liability" clause caps damages for any cause of action against them "up to an amount equal to your Services fee for the month during which the loss or breach occurred (or up to $10.00 if the Services are free)."[6] Microsoft's one-sided

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1 "The average American adult has an eighth-grade reading level." Jonathan M. Barnes, Comment, *Tailored Jury Instructions: Writing Instructions That Match a Specific Jury's Reading Level*, 87 MISS. L.J. 193, 195 (2018); *What's the Latest U.S. Literacy Rate?*, WYLIE COMMC'NS, https://www.wyliecomm.com/2021/08/whats-the-latest-u-s-literacy-rate [https://perma.cc/5A55-PXKF] ("Medical information for the public should be written at no higher than an eighth-grade reading level, according to the American Medical Association, National Institutes of Health and Centers for Disease Control and Prevention[.]").

2 *Microsoft Services Agreement*, MICROSOFT (June 15, 2022), https://www.microsoft.com/en-us/servicesagreement [https://perma.cc/ZE6G-5LH5].

3 *See id.*; Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1106–07 (2012) ("A 'browsewrap' is an internet-related quickwrap where a consumer purportedly assents by simply browsing the website and not by clicking on an agreement through a hyperlink or radio button. A federal court described browsewrap as taking divergent forms, but its predicate is that this contracting form does not require the user to manifest assent because '[a] party instead gives his assent simply by using the website.'" (alteration in original) (footnote omitted) (quoting Sw. Airlines Co. v. BoardFirst, LLC, No. 06-CV-0891, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007))). "The notice that supposedly binds the consumer may be a web page, link, or a small disclaimer on a web page that gives notice that the visitor's use of a website is conditional on his or her agreeing to restrictive terms or conditions." *Id.* at 1107; *see also* Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017) (stating that a browsewrap agreement "generally post[s] terms and conditions on a website via a hyperlink at the bottom of the screen").

4 For the sake of consistency, this Article will use the term "ToU" to refer to all standard form agreements.

5 *Microsoft Services Agreement*, *supra* note 2 ("We may change these Terms at any time, and we'll tell you when we do. Using the Services after the changes become effective means you agree to the new terms. If you don't agree to the new terms, you must stop using the Services, close your Microsoft account and, if you are a parent or guardian, help your minor child close his or her Microsoft account.").

6 *Id.*

limitation on recoverable damages applies to all of its products and services, including its Windows program. Microsoft's ToU eliminates nearly every type of "damages or losses, including direct, consequential, lost profits, special, indirect, incidental, or punitive."[7]

Microsoft's standard form agreement requires consumers to submit any disputes to arbitration, and the arbitration clause prohibits them from initiating or joining class actions, also known as an anti-class action waiver. This inequitable provision is a waiver of consumers' constitutional right to have their claim heard by a jury.[8] Specifically, Microsoft users are barred from joining "[c]lass action lawsuits, class-wide arbitrations, private attorney-general actions, requests for public injunctions, and any other proceeding . . . where someone acts in a representative capacity."[9] Microsoft's arbitration and anti-class action clause is effectively a "no liability" zone. One-sided ToU where consumers waive important contractual and constitutional rights raise serious concerns of procedural and substantive unfairness. To update Oliver Wendell Holmes Jr.'s famous quote, Microsoft's boilerplate is a "product of lawyers 'shoveling smoke.'"[10]

Part I of this Article utilizes the FRE and Flesch-Kincaid Grade Level (FKGL) tests to calculate the readability of ToU, terms of service, and other standard form agreements of: (1) the 100 largest retailers; (2) the 100 largest digital companies; (3) the 100 largest software companies; (4)

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7 *Id.*

8 By its explicit terms, Microsoft's predispute mandatory arbitration clause requires users to waive their Seventh Amendment right to a jury trial or to have their case heard by a judge:

> We hope we never have a dispute, but if we do, you and we agree to try for 60 days, upon receipt of a Notice of Dispute, to resolve it informally. If we can't, you and we agree to binding individual arbitration before the American Arbitration Association ("AAA") under the Federal Arbitration Act ("FAA"), and not to sue in court in front of a judge or jury. Instead, a neutral arbitrator will decide and the arbitrator's decision will be final except for a limited right of review under the FAA.

Id.; *see* Silc v. Crossetti, 956 F. Supp. 2d 957, 958 (N.D. Ill. 2013) ("Since the Seventh Amendment right to trial by jury is incident to and predicated upon the right to a federal judicial forum, an arbitration provision waives the right to resolve a dispute through litigation in a judicial forum and implicitly and necessarily waives the parties' right to a jury trial."). The Illinois federal court concluded that in agreeing to arbitration, the parties "would forego a judicial forum and have the case resolved pursuant to the Commercial Arbitration Rules of the American Arbitration Association." *Id.* at 960; *see also* Hudson v. Bah Shoney's Corp., 263 F. Supp. 3d 661, 667 (M.D. Tenn. 2017) (concluding that a restaurant worker did not knowingly or voluntarily waive her Seventh Amendment right to a jury trial by submitting to arbitration, and therefore the agreement was unenforceable).

9 *Microsoft Services Agreement*, *supra* note 2.

10 *Oliver Wendell Holmes, Jr. Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/oliver_wendell_holmes_jr_382541 [https://perma.cc/HQ8P-2P6Z].

the 50 largest banks; and (5) the 33 largest credit card companies.[11] Overall, consumer contracts[12] are drafted at a college level—six grade levels (or greater) higher than the average American adult's reading level. American consumers have a duty to read the contracts they sign, but the largest U.S. companies have no equivalent duty to make their ToU understandable.

Part II compares the readability of rights-foreclosure clauses—such as arbitration/anti-class action clauses, warranty disclaimers, and liability limitations (caps on damages)—with the consumer contract as a whole. The most noteworthy finding is that leading U.S. companies draft foreclosure clauses to be even more incomprehensible than the ToU as a whole. Not only are many ToU clauses unreadable by the average American, but they also "cannibalize" consumer remedies by deploying these types of rights-foreclosure clauses.

Part III proposes a New Deal for Consumer Contracts to address the incomprehensibility and unfairness of U.S. consumer contracts. These reforms would require U.S. companies to draft consumer contracts at the eighth-grade level or below to ensure that they are readable irrespective of the device used (desktop, mobile, etc.). The substantive part of the New Deal for Consumer Contracts would invalidate unfair and deceptive rights-foreclosure clauses, such as caps on damages, predispute mandatory arbitration clauses, and warranty disclaimers, that strip consumers of any meaningful remedy. These reforms would standardize U.S. consumer law with that of the European Union (EU), thus minimizing the risk that U.S. companies will be subject to multi-million-dollar penalties by EU regulators.

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11 All calculations within this Part are based on the formulas and interpretations found in Eissler, *infra* note 30. The five subsamples were drawn from the following sources: (1) the 100 largest retailers were drawn from *Top 100 Retailers 2021 List*, NAT'L RETAIL FED'N, https://nrf.com/resources/top-retailers/top-100-retailers/top-100-retailers-2021-list [https://perma.cc/5LKG-7Q75] (Sept. 27, 2021) (ranked according to sales); (2) the 100 largest digital companies were drawn from *Top 100 Digital Companies*, FORBES, https://www.forbes.com/top-digital-companies/list/#tab:rank [https://perma.cc/NJ3E-X4VK] (2019 rankings); (3) the 100 largest software companies were drawn from *The Top 100 Software Companies of 2021*, SOFTWARE REP. (July 12, 2021), https://www.thesoftwarereport.com/the-top-100-software-companies-of-2021 [https://perma.cc/G9ZU-U4X8]; (4) the 50 largest banks were drawn from *Top 50 Banks in Americ*a, ADV RATINGS, https://www.advratings.com/banking/top-banks-in-the-us [https://perma.cc/K6UQ-QJDG]; (5) the 33 largest credit card companies were drawn from Adam McCann, *Credit Card Market Share by Issuer*, WALLETHUB (June 10, 2022), https://wallethub.com/edu/cc/market-share-by-credit-card-issuer/25530 [https://perma.cc/XMD8-78CQ].

12 For purposes of this study, "consumer contracts" are defined as written agreements entered into primarily for personal, family, or household purposes. This is consistent with the definition of "consumer" in the key pieces of the European Union's consumer protection legislation: "a consumer is an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession." *Consumer Contracts: Is It a Consumer Contract?*, PRAC. L. COM., https://uk.practicallaw.thomsonreuters.com/w-022-4729 (last visited Nov. 27, 2022).

I. U.S. CONSUMER CONTRACTS ARE UNREADABLE

A. *The Duty to Read*

The duty to read doctrine is "an important building block of U.S. contract law."[13] Consumers have a duty to read contracts as contracting parties and are presumed to have read the contract before agreeing to its terms. Accordingly, "in the absence of fraud, overreaching or excusable neglect, . . . one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it."[14] Important legal implications arise when a consumer fails to read the terms of a contract: the consumer will generally still be bound by the contract, and this failure is typically not a sufficient ground to either void the contract or "trigger a contractual mistake necessary for contract reformation."[15]

Despite this duty to read, "very few consumers actually read or review standard-form boilerplate"[16] ToU, which are drafted by the nation's most prominent companies, are indecipherable to the average American adult. More than 99% of the terms and conditions of five hundred popular American websites go beyond the reading level of the average American adult.[17] Incomprehensible standard form contracts thus cast doubt on whether a consumer who cannot comprehend the terms is even capable of manifesting assent.[18] When courts enforce contracts that cannot be understood by most American adults, consumers waive constitutional and substantive contract rights without

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13 Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2257 (2019); *see also* Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1451 (2014) ("The duty to read is a long-standing principle in Anglo-American contract law . . . . ").

14 Roldan v. Callahan & Blaine, 161 Cal. Rptr. 3d 493, 497 (Ct. App. 2013) (quoting Stewart v. Preston Pipeline Inc., 36 Cal. Rptr. 3d 901, 920–21 (Ct. App. 2005)).

15 Benoliel & Becher, *supra* note 13, at 2260.

16 Rustad & Koenig, *supra* note 13, at 1456. *See generally* Sara R. Benson, *Social Media Researchers and Terms of Service: Are We Complying with the Law?*, 47 AIPLA Q.J. 191 (2019) (highlighting common issues with social media ToU).

17 *See* Dustin Patar, *Most Online 'Terms of Service' Are Incomprehensible to Adults, Study Finds*, VICE (Feb. 12, 2019, 2:51 PM), https://www.vice.com/en/article/xwbg7j/online-contract-terms-of-service-are-incomprehensible-to-adults-study-finds [https://perma.cc/L5G8-L9QD]; Debra Cassens Weiss, *99% of Website Sign-Up Contracts Are Unreadable, Study Finds*, ABA J. (Feb. 21, 2019, 9:24 AM), https://www.abajournal.com/news/article/the-vast-majority-of-website-user-agreements-fall-below-readability-recommendations-study-finds [https://perma.cc/LF76-GHZA]; *see also* Benoliel & Becher, *supra* note 13, at 2257–58.

18 *See In re* Zappos.com, Inc., Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012). The court held that the ToU was too inconspicuous to "conclude that Plaintiffs ever viewed, let alone manifested [their] assent to, the Terms of Use." *Id.*

an intelligent understanding of the one-sided clauses drafted by powerful U.S. companies. There cannot truly be a manifestation of assent to terms and agreements, which are—for all intents and purposes—indecipherable. The widespread problem of unreadability is a consumer protection issue, but it is also a question of unethical corporate behavior, which is addressed by the procedural and substantive reforms proposed in this Article.

B. *No Duty of Readability*

Notwithstanding that consumers are bound by the agreements they sign, even those they cannot fully understand,[19] there is no concurrent duty for companies to make consumer contracts readable.[20] "Readability" is a measure of how easily a text can be read and understood.[21] Significant to this analysis are elements that determine the reader's "optimal" reading speed and abilities to both understand and find it interesting.[22]

The chief factors that go into readability are "sentence length, sentence structure, and the average syllables per word"[23]—all of which, when combined, determine the reader's likelihood of understanding the text.[24] High readability increases the likelihood that the consumer will understand the terms of the contracts they sign.[25] Thus, when a contract has low readability, the reasonable consumer often does not know to what they are agreeing.[26] "Just as bed bugs hide in cracks and crevices of

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19 John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 341 (1974) ("Every lawyer learned early in the course on contracts that a party may be bound by an instrument which he has not read.").

20 Patar, s*upra* note 17; Benoliel & Becher, *supra* note 13, at 2258; Weiss, *supra* note 17.

21 *What Is Readability and How Does It Work?*, TEXT INSPECTOR (Nov. 16, 2020), https://textinspector.com/what-is-readability-and-how-does-it-work [https://perma.cc/2547-JYV7]. Readability "is a study of the complexity of the concepts of the language that takes into consideration the syntax, the structure and the complexity of the vocabulary." Seltzer v. Foley, 502 F. Supp. 600, 606 (S.D.N.Y. 1980).

22 Veronica J. Finkelstein & Jack Foley, *The Importance of Readability*, N.J. LAW. MAG., Oct. 2021, at 10.

23 Jennifer Calonia, *What Is Readability?*, GRAMMARLY BLOG (Sept. 2, 2020), https://www.grammarly.com/blog/readability [https://perma.cc/T4KM-MW87].

24 *See id.*

25 *Id.*

26 *See* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1–2 (2014); David Lazarus, *Want to Read a Tech Company's User Agreements? Got 90 Minutes to Spare?*, L.A. TIMES (Aug. 24, 2021, 6:00 AM), https://www.latimes.com/business/story/2021-08-24/column-consumer-contracts [https://perma.cc/RB9B-ZNLJ]; *see also* Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUS. INSIDER (Nov. 15, 2017, 7:30 AM),

mattresses and box springs, sneakwrap documents, masquerading in the clothing of contracts, purport to bind consumers to oppressive and unfair terms."[27] U.S. companies are systematically depriving users of any meaningful remedy when they eliminate every conceivable category of damages, disclaim all warranties, and require the user to submit to arbitration, waiving their right to join class actions.

This Article underscores the importance of restoring the balance between a consumer's *duty* to read a consumer contract prior to signing and the *readability* of such contracts. Further, this Article proposes a solution to the gap between the consumer's duty to read and the provider's duty to draft readable contracts. Specifically, imposing a minimum readability standard of grade eight and invalidating one-sided clauses designed to eliminate all important rights would harmonize U.S. consumer law with that of the EU.

1. Leading Readability Tests

This Section of the Article analyzes the readability of consumer contracts for the largest U.S. companies using the Flesch-Kincaid standard measures of readability. The Flesch-Kincaid readability tests have two parts: the FRE and the FKGL.[28]

a. Flesch Reading Ease

The FRE test, developed by Rudolf Flesch sixty-five years ago, is the most widely employed test for readability.[29] The FRE score is defined by "the average number of words in a sentence" and "the average number of

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https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 [https://perma.cc/693Q-YJPA] (discussing a Deloitte study which found that 91% of consumers blindly accept terms and conditions); Jessica Guynn, *What You Need to Know Before Clicking 'I Agree' on That Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 29, 2020, 2:21 PM), https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002 [https://perma.cc/7N23-K49E].

27 Rustad & Onufrio, *supra* note 3, at 1086.

28 *NL 10605.105 What Is the Flesch-Kincaid Readability Test?*, SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (POMS) (Sept. 28, 2015) [hereinafter *NL 10605.105*], https://secure.ssa.gov/poms.nsf/lnx/0910605105 [https://perma.cc/X4W7-8MVR]; *see* Norman Otto Stockmeyer, *Using Microsoft Word's Readability Program*, MICH. BAR J., Jan. 2009, at 46, 46 ("Word's Flesch Reading Ease score is based on a formula developed in 1949 by Rudolf Flesch. It is computed using the average number of syllables per word and words per sentence.").

29 *See* Deras v. Roberts, 788 P.2d 987, 993 n.7 (Or. 1990) ("For all measures, the Secretary of State by rule shall designate a test of readability and adopt a standard of minimum readability for a ballot title. The ballot title shall comply with the standard to the fullest extent practicable consistent with the requirements of impartiality, conciseness and accuracy." (quoting OR. REV. STAT. ANN. § 250.039 (repealed 1995))). *See generally* RUDOLF FLESCH, THE ART OF READABLE WRITING (1949) (describing the FRE score methodology).

syllables in a word."[30] FRE scores range from 0 to 100 with the following interpretations:

Table One: Interpretation of the FRE[31]

FRE Score	*Comprehension Level*
90 to 100	Very Easy
80 to 89	Easy
70 to 79	Fairly Easy
60 to 69	Standard
50 to 59	Fairly Difficult
30 to 49	Difficult
0 to 29	Very Confusing

FRE test results can also be expressed "in terms of the grade level a hypothetical reader should have achieved before the selected passage would be readable."[32] For example, "[s]coring between 70 to 80 is equivalent to school grade level 8,"[33] while "[s]cores from 60 to 70 are plain English, readable by the average reader."[34]

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30 *Flesch Reading Ease and the Flesch Kincaid Grade Level*, READABLE [hereinafter *FRE & FKGL*], https://readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level [https://perma.cc/95Y5-WMAX]; *see also* MJ Eissler, *How to Use the Flesch and Flesch-Kincaid Tests to Improve Blog Readability*, OKWRITE, https://okwrite.co/blog/2021/05/19/how-to-use-the-flesch-and-flesch-kincaid-tests-to-improve-blog-readability [https://perma.cc/CVU5-43BW] ("The [FRE] Test focuses on long sentences and long (polysyllabic) words."); *id.* ("The formula for the test is: 206.835 – 1.015 x (words/sentences) – 84.6 x (syllables/words)."). *See generally* FLESCH, *supra* note 29; *NL 10605.105*, *supra* note 28.

31 Eissler, *supra* note 30.

32 Ian Gallacher, *"When Numbers Get Serious": A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals*, 46 SUFFOLK U. L. REV. 451, 458 (2013); *see* John Garger, *Determine Readability Using the Flesch Reading Ease*, JOHN GARGER (Jan. 29, 2020), https://www.johngarger.com/blog/determine-readability-using-the-flesch-reading-ease [https://perma.cc/YD8N-UHVY]. The FKGL test translates the FRE score into a grade level as follows:

> The formula takes average sentence length and multiplies it by 0.39, and average number of syllables and multiplies it by 11.8. These products are summed, and the result is reduced by 15.59. Therefore, the formula is:
>
> 0.39 (total words/total sentences) + 11.8 (total syllables/total words) – 15.59[.]
>
> A score of about 65 correlates with the 8th to 9th grade level, and a score of about 55 indicates a 10th to 12th grade level. Scores between 0 and 30 represent college graduate readability.

Id.

33 *FRE & FKGL*, *supra* note 30.

34 Garger, *supra* note 32.

b. Flesch-Kincaid Grade Level

The FKGL determines a U.S. grade school level for a specific document, with grades ranging from kindergarten through twelfth grade. The FKGL formula includes "(1) the average sentence length (ASL), which is the number of words divided by the number of sentences, and (2) the average number of syllables per word (ASW), which is the number of syllables divided by the number of words."[35] The test also considers active voice when computing the corresponding grade level.[36] The resulting grade level represents the minimum number of years of educational attainment necessary in order to read and comprehend a particular text.[37] "For example, a score of 4.3 indicates a Grade 4 readability level, while a score higher than 12 indicates college-level readability."[38]

The FRE test can also be translated into a grade level equivalent, as illustrated below:

Table Two: Interpretation of the FKGL[39]

FKGL Score	*Grade Level*	*Comprehension Level*
5.0–5.9	5th Grade	Very Easy
6.0–6.9	6th Grade	Easy
7.0–7.9	7th Grade	Fairly Easy
8.0–9.9	8th & 9th Grade	Plain English
10.0–12.9	10th, 11th & 12th Grade	Fairly Difficult
13.0–15.9	College	Difficult
16.0–17.9	College Graduate	Very Difficult
18.0+	Professional	Extremely Difficult

Critics maintain that the FRE score is difficult to interpret, lacks context and "real-world meaning,"[40] and "negatively correlates with other

35 Amanda Reid, *Readability, Accessibility, and Clarity: An Analysis of DMCA Repeat Infringer Policies*, 61 JURIMETRICS J. 405, 415 (2021). As noted above, the FKGL formula is: "0.39 (total words/total sentences) + 11.8 (total syllables/total words) – 15.59." Garger, *supra* note 32.

36 Greg Johnson, *Assessing the Legal Writing Style of Brett Kavanaugh*, VT. BAR J., Fall 2018, at 30, 32.

37 *See Automatic Readability Checker*, READABILITY FORMULAS, https://readabilityformulas.com/freetests/six-readability-formulas.php [https://perma.cc/Y2CU-SBQ8]; Thomas H. Koenig & Michael L. Rustad, *Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done*, 93 NEB. L. REV. 592, 616 n.131 (2015) (noting that Rudolf Flesch and John P. Kincaid cocreated the FRE test).

38 Eissler, *supra* note 30.

39 *See* Georgia Fenwick, *Flesch Reading Ease: Everything You Need to Know*, WRITING STUDIO (Oct. 25, 2020), https://writingstudio.com/blog/flesch-reading-ease/#:~:text=The%20Flesch%20Reading%20Ease%20Score%20is%20a%20great,assigns%20each%20score%20bracket%20with%20a%20corresponding%20grade [https://perma.cc/W588-EJ2M].

40 *Id.*

readability formulas."[41] To bridge this gap, the FKGL puts the FRE score into context by assigning "each score bracket with a corresponding grade."[42]

As noted in Table Three below, a number of states require a minimum FRE or FKGL score to ensure the readability of documents, including consumer disclosures, so that the general public can understand them.[43] The FKGL test "is a reformulation of the Flesch Reading Ease Score test that expresses its result in terms of the grade level a hypothetical reader should have achieved before the selected passage would be readable."[44] This assesses the consumer contracts' readability scores by using both measures.

Table Three: Minimum Readability Requirements in State Statutes[45]

State	*Consumer Contract*	*Flesch-Kincaid Score*
Arkansas	Insurance Policies	Minimum of 40 on FRE (Difficult)
Connecticut	Insurance Policies	Minimum of 45 on FRE (Difficult)
Florida	Insurance Policies	Minimum of 45 on FRE (Difficult)
Hawaii	Insurance Policies	Minimum of 40 on FRE (Difficult)
Illinois	Agricultural Production Contracts	No higher than Grade 12 on FKGL
Minnesota	Consumer Materials on Public Assistance	Understandable at the seventh-grade level using the "Flesch scale analysis readability score"
South Carolina	Credit Life Insurance and Credit Accident and Sickness Insurance Policies	No higher than the seventh grade on FKGL
Texas	Contracts for Services for Clients of Private Child Support Agencies	Minimum of 49 on FRE or no higher than Grade 10 on FKGL

41 Sameer Badarudeen & Sanjeev Sabharwal, *Assessing Readability of Patient Education Materials: Current Role in Orthopaedics*, 468 CLINICAL ORTHOPAEDICS & RELATED RSCH. 2572, 2575 tbl.1 (2010).

42 Fenwick, *supra* note 39.

43 *See, e.g.*, FLA. STAT. ANN. § 627.4145 (West 2003) (requiring that insurance policies be written with a minimum FRE score of 45). Life insurance is required to "clearly and conspicuously" include disclosures written at "a grade level score of no higher than seventh grade on the Flesch-Kincaid readability test." S. JOURNAL, 113th Sess. (S.C. 1999).

44 Gallacher, *supra* note 32, at 458.

45 Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147, 148 n.7 (2007) (reporting state minimum readability requirements).

C. *The Average U.S. Adult Has Poor Reading Skills*

The standard FRE score must be sixty or above to ensure that the text will be understood by the average American adult, who reads at the eighth-grade level.[46] Moreover, the National Center for Education Statistics estimated that 21% to 23% of American adults have "demonstrated skills in the lowest level of prose, document, and quantitative proficiencies."[47] Notably, the Pew Research Center determined that 71% of Facebook users had a high school education or less, too low to grasp the website's ToU.[48]

A study by the National Assessment of Educational Progress evidenced that between 2017 and 2019, literacy rates dwindled across the states.[49] Although the recommended FKGL score is Grade 8,[50] 45 million Americans were functionally illiterate and unable to read above a fifth-grade level in 2017, meaning that many Americans cannot comprehend widely deployed consumer contracts.[51] When comparing reading test scores among economically developed countries, the United States still scores below countries in both Europe and Asia.[52] The mean U.S. reading skill, calculated on a 500 point scale, was 270—3 points below the

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46 Barnes, *supra* note 1, at 195.

47 IRWIN S. KIRSCH, ANN JUNGEBLUT, LYNN JENKINS & ANDREW KOLSTAD, ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY xvi (3d ed. 2002).

48 Maeve Duggan & Aaron Smith, *Demographics of Key Social Networking Platforms*, PEW RSCH. CTR. (Dec. 30, 2013), http://www.pewinternet.org/2013/12/30/demographics-of-key-social-networking-platforms [http://perma.unl.edu/6L8L-NXNH].

49 Jenn Smith, *Experts and Educators Share Ways to Help Struggling Readers*, SEATTLE TIMES, Nov. 15, 2021, at A10.

50 The Flesch Kincaid Grade Level has the [sic] some of [the] following levels: 0, 2, 4, 6, 8, 10, 12, 14, 16, and 18. The higher you score, the more difficult the text is to read. As a general guide, it is a smart idea to aim for a Flesch Kincaid reading level of 8. This is because the average reader will have reading skills equivalent to 8th graders.

Flesch Kincaid Grade Level Readability, TEXTCOMPARE (emphasis omitted), https://www.textcompare.org/readability/flesch-kincaid-grade-level#:~:text=It%20is%20actually%20a%20modified%20formula%20of%20another,1940s%20and%20modified%20it%20for%20the%20US%20Navy [https://perma.cc/YU3A-ZYAD].

51 *Illiteracy by the Numbers*, LITERACY PROJECT, https://literacyproj.org [https://perma.cc/D37W-86UM] ("50% of adults cannot read a book written at an eighth-grade level[.]"); *see also* Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 438 (2011) ("[T]he recommended readability level for . . . text written for broad public consumption is no higher than 8.0 on the Flesch-Kincaid scale . . . .").

52 Louis Serino, *What International Test Scores Reveal About American Education*, BROOKINGS (Apr. 7, 2017), https://www.brookings.edu/blog/brown-center-chalkboard/2017/04/07/what-international-test-scores-reveal-about-american-education [https://perma.cc/FK79-VVKR].

international average.[53] Data from the Program for the International Assessment of Adult Competencies concluded that "[n]ot only did Americans score poorly compared to many international competitors, the findings reinforced just how large the gap is between the nation's high- and low-skilled workers."[54] In contrasting reading comprehension skills between the United States and other developed countries,[55] it is important to consider why adult readers in the United States fare worse than adult readers in the EU countries.[56] One contributing factor may be that educational policies in Europe "stress the importance of promoting a literate environment in the home."[57] For example, the High Level Group of Experts on Literacy emphasizes that the home and school environments must "reinforce each other in order to boost high literacy levels."[58] The reading assessment data in this Section confirms that many

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53 *US Adults Score Below Average on Worldwide Test*, FLA. TIMES-UNION (Oct. 8, 2013, 7:53 AM), https://www.jacksonville.com/story/news/education/2013/10/08/us-adults-score-below-average-worldwide-test/15813751007 [https://perma.cc/U4ZL-GXE2].

54 *Id.*

55 *See* Karantzi Ismini, *European Texts and Readability*, INST. OF RSCH. & TRAINING ON EUR. AFFS. (Oct. 14, 2016), http://www.irtea.gr/?p=2661&lang=en [https://perma.cc/L7QS-K3VQ]; Barbara K. Kondilis, Ismene J. Kiriaze, Anastasia P. Athanasoulia & Matthew E. Falagas, *Mapping Health Literacy Research in the European Union: A Bibliometric Analysis*, PLOS ONE, June 2008, at 1; *see also* Lau Tak Pang, Chinese Readability Analysis and Its Applications on the Internet, at i–ii (Oct. 2006) (MPhil thesis, The Chinese University of Hong Kong) (CORE).

56 *See* Michael T. Nietzel, *Low Literacy Levels Among U.S. Adults Could Be Costing the Economy $2.2 Trillion a Year*, FORBES (Sept. 9, 2020, 7:14 AM), www.forbes.com/sites/michaeltnietzel/2020/09/09/low-literacy-levels-among-us-adults-could-be-costing-the-economy-22-trillion-a-year/?sh=913d1934c904 [https://perma.cc/UU6M-BL9Y]; *What's the Latest U.S. Literacy Rate?*, *supra* note 1; *see also* Jill Barshay et al., *America's Reading Problem: Scores Were Dropping Even Before the Pandemic*, HECHINGER REP. (Nov. 10, 2021), https://hechingerreport.org/americas-reading-problem-scores-were-dropping-even-before-the-pandemic [https://perma.cc/BX2B-834X]; *International Comparisons of Achievement*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=1 [https://perma.cc/TNZ3-8M66] ("The United States scored lower than 12 education systems: Moscow City (Russian Federation), the Russian Federation, Singapore, Hong Kong (China), Ireland, Finland, Poland, Northern Ireland (United Kingdom), Norway, Chinese Taipei (China), England (United Kingdom), and Latvia."); *see also* Drew DeSilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RSCH. CTR. (Feb. 15, 2017), https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science [https://perma.cc/HT34-E6EC] (reporting that average reading skills of U.S. fifteen-year-olds taking the Program for International Student Assessment ranked twenty-fourth below many European countries including Finland, Ireland, Latvia, Norway, Germany, Poland, Slovenia, Netherlands, Denmark, Sweden, Belgium, France, United Kingdom, and Portugal).

57 Luisa Araújo & Patricia Costa, *Home Book Reading and Reading Achievement in EU Countries: The Progress in International Reading Literacy Study 2011 (PIRLS)*, 21 EDUC. RSCH. & EVALUATION 422, 422–23, 425 (2015) (concluding from a study that examined "the association between frequency of book reading before the start of compulsory education and the reading achievement of 4th-grade students whose parents have high and low education levels in 22 European countries").

58 *Id.* at 423.

adults in the United States lack the reading skills to understand basic legal documents such as a website's ToU, and comparative reading assessment studies confirm that the United States lags behind the reading skills of many other countries, including those in the EU.

D. *Past Studies of Readability*

1. Readability of Consumer Software License Agreements

A New York University (NYU) research team assessed what changed between 2003 and 2010 in the terms of 264 mass-market consumer software license agreements.[59] The researchers documented differences in end user license agreements (EULA) over the seven-year period during which they studied, finding that "[t]hirty-nine percent of the sample firms made material changes to their contracts during the seven-year period, despite the fact that the product being licensed was held as constant as possible."[60]

The researchers also discovered that contracts, on average, are no easier to read, despite getting longer.[61] Further, the average license agreement is as difficult to read as a scientific publication, which is far beyond what could be grasped by the average American adult.[62] In most instances, the changes made the terms "more pro-seller relative to the original contract."[63] However, the NYU study found that consumer software agreements passed the readability test mandated for insurance contracts by a wide margin.[64]

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59 *See* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 243 (2013) ("We use a sample of EULAs from 264 mass-market software firms between 2003 and 2010 to track changes to thirty-two common contractual terms. Our methodology measures the relative buyer-friendliness of each term relative to the default rules of Article 2 of the Uniform Commercial Code (U.C.C.) to examine how the pro-seller bias of EULAs changes over time. Since buyers need to become informed about terms to 'shop' around effectively, we measure changes in contract length and readability. We begin exploring the firm, product, and market characteristics that are associated with contract changes. Finally, we record relevant court decisions around the sample period to evaluate whether the sample contracts are sensitive to changes in the enforceability of terms.").

60 *Id.* at 243–44 ("[A] material change occurs when a EULA changes at least one of the thirty-two terms that we track.").

61 *Id.* at 244.

62 *Id.* at 253 ("EULAs are comparable to articles in scientific journals, which typically have Flesch-Kincaid scores of around thirty. Thus, Panel C indicates that contracts are not only getting longer but also remain difficult to read." (footnote omitted)).

63 *Id.* at 244 ("Most of these changes are driven by firms opting out of U.C.C. Article 2 default rules in favor of relatively more pro-seller terms.").

64 *Id.* at 253–54.

In another study, researchers calculated the readability of diverse consumer contracts[65] and found that approximately 99% of website sign-in-wrap contracts are indecipherable.[66] Based on these findings, the researchers proposed solutions likely to improve readability among certain consumer contracts.[67]

2. Readability of Internet-Related Health Information

Disclosures about medical procedures given to patients and their families must be drafted to increase accessibility and allow for equitable long-term health outcomes. As such, physicians, universities, hospitals, and medical societies must ensure that they produce readable content.

A team of medical researchers conducted three studies evaluating the accessibility, content, and readability of publicly available health information posted on the Internet.[68] The researchers found that less than 25% of search results on the first pages led to relevant content, with 20% in English and 12% in Spanish.[69] Of these, "[a]ll English and 86% of Spanish Web sites required high school level or greater reading ability."[70] While the information was generally accurate, researchers concluded that "[c]overage of key information on English- and Spanish-language Web sites is poor and inconsistent."[71] In sum, the studies concluded that comprehending Web-based health information requires high reading levels.[72]

Another public health team studied the readability of online COVID-19 information and determined whether scores differed across various English-speaking countries.[73] The researchers concluded:

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65 Benoliel & Becher, *supra* note 13, at 2256. "The results of this study indicate that consumer sign-in wrap contracts are generally unreadable." *Id.* at 2277. The research findings illustrate consumer contracts within social media and how the average U.S. adult has at least two forms of social media where a contract has been created. *Id.* at 2284.

66 *Id.* at 2278–79.

67 *Id.* at 2286–87 (demonstrating policy solutions within firms); *see also* Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467, 488 (2014).

68 Gretchen K. Berland et al., *Health Information on the Internet: Accessibility, Quality, and Readability in English and Spanish*, 285 JAMA 2612, 2612 (2001).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*; *see* Tiffany M. Walsh & Teresa A. Volsko, *Readability Assessment of Internet-Based Consumer Health Information*, 53 RESPIRATORY CARE 1310, 1310, 1315 (2008); Nilay Boztas et al., *Readability of Internet-Sourced Patient Education Material Related to "Labour Analgesia"*, MED., 2017, at 1.

73 Amy P. Worrall et al., *Readability of Online COVID-19 Health Information: A Comparison Between Four English Speaking Countries*, BMC PUB. HEALTH, 2020, at 1, 1.

> There were poor levels of readability webpages reviewed, with only 17.2% of webpages at a universally readable level. There was a significant difference in readability between the different webpages based on their information source ($p < 0.01$). Public Health organisations and Government organisations provided the most readable COVID-19 material, while digital media sources were significantly less readable. There were no significant differences in readability between regions.[74]

In the context of major orthopedic websites, "most of the patient education materials . . . are written at a reading level that may be too advanced for comprehension by a substantial proportion of the population."[75] The Stanford University researchers conducted a study by employing the following searches:

> "Google searches of the terms 'Cleft Palate Surgery' and 'Palatoplasty' were performed. Additionally, searches of only 'Cleft Palate Surgery' were run from several internet protocol addresses globally. . . . Search results for 'Cleft Palate Surgery' were easier to read and comprehend compared to search results for 'Palatoplasty.' Mean Flesch-Kincaid Grade Level scores were 7.0 and 10.11, respectively (P = .0018). Mean Flesch-Kincaid Reading Ease scores were 61.29 and 40.71, respectively (P = .0003). Mean Gunning Fog Index scores were 8.370 and 10.34, respectively (P = .0458). Mean [Simple Measure of Gobbledygook (SMOG)] Index scores were 6.84 and 8.47, respectively (P = .0260). Mean Coleman-Liau Index scores were 12.95 and 15.33, respectively (P = .0281). . . ."[76]

The researchers concluded that the top search results for "Cleft Palate Surgery" had an average readability of a seventh-grade reading level, which "compares favorably to other health care readability analyses."[77]

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74 *Id.*; *see* Rosemary Gottlieb & Janet L. Rogers, *Readability of Health Sites on the Internet*, 7 INT'L ELEC. J. HEALTH EDUC. 38, 38 (2004) ("Results of the study indicate that health educators need to be aware of the reading levels of the health information they are placing on the Internet. If the level of health information material is above the comprehension level of the general public, many individuals will be at a disadvantage in comprehending health information required to make personal health decisions."); *see also* Anuoluwapo Oloidi, Sabina Onyinye Nduaguba & Kehinde Obamiro, *Assessment of Quality and Readability of Internet-Based Health Information Related to Commonly Prescribed Angiotensin Receptor Blockers*, PAN AFR. MED. J., Mar. 11, 2020, at 1 (showing online content to be of moderate difficulty and suboptimal readability).

75 Badarudeen & Sabharwal, *supra* note 41, at 2572.

76 *Findings from Stanford University in Cleft Lip and Palate Reported (Readability of Online Patient Information Relating to Cleft Palate Surgery) Mouth Diseases and Conditions—Cleft Lip and Palate*, HEALTH & MED. DAILY, Nov. 11, 2021, 2021 WLNR 36965876 (quoting research from Stanford University).

77 *Id.* (quoting research from Stanford University).

In another study, the Tel Aviv Sourasky Medical Center performed an online search using terms related to sudden sensorineural hearing loss (SSNHL).[78] Two independent physicians performed a content analysis of the readability of patient education materials using a sample of the ten most frequently consulted patient education websites.[79] They defined "quality" according to the FRE and FKGL, and defined "understandability" and "actionability" according to the Patient Education Materials Assessment Tool and Clinical Practice Guideline (CPG) adherence.[80]

The researchers found that "[t]he average FRE score was 'fairly difficult' (mean 57.28, median 55.55, range 46.4–71.8) and the average FKGL score was 'standard' (mean 9th grade, median 9th grade, range 5th–10th grade)."[81] "Internet resources for patient education on SSNHL vary in quality and are generally understandable to the average layman."[82] Thus, even though patient education sites were relatively accessible, the researchers concluded that it would be desirable to have "more comprehensive and easier-to-read information to improve patients' medical knowledge about their condition."[83]

3. Study of Readability of Social Media Terms of Use

The most comprehensive previous readability study examined the readability of 329 social media consumer contracts.[84] The study found that the average FRE score of these consumer agreements was 47.8, making them more challenging for the average U.S. adult to comprehend.[85] The social media researchers determined that:

> The largest number of social media TOUs were drafted at a Flesch Readability Ease level classified as "difficult" (scores of thirty to thirty-nine) (N=148). Thirty-nine percent of the TOUs had readability scores between fifty and fifty-nine, which means they were "fairly difficult" to understand (N=125). Five percent of the TOUs were rated as "very

78 *Tel Aviv Sourasky Medical Center Reports Findings in Sensorineural Hearing Loss (Evaluation of the Quality of Online Information on Sudden Sensorineural Hearing Loss)*, EDUC. DAILY REP., Nov. 29, 2021, 2021 WLNR 38980547.

79 *Id.*

80 *Id.*

81 *Id.* (quoting research from Tel Aviv Sourasky Medical Center).

82 *Id.* (quoting research from Tel Aviv Sourasky Medical Center).

83 *Id.* (quoting research from Tel Aviv Sourasky Medical Center).

84 *See* Rustad & Koenig, *supra* note 13, at 1435.

85 *Id.* at 1460 tbl.3.

> confusing," with scores between zero and twenty-nine (N=18)—scores that are particularly problematic.[86]

The social network agreement study concluded that rights-foreclosure clauses in ToU are drafted onerously, at a reading level substantially higher than the average consumer can comprehend. When analyzing the "Big Five" most popular social media sites, none of the ToU achieved the standard reading level score of 60 and were thus drafted above the average reader's comprehension.[87] In light of that conclusion, the social media study proposed a consumer contract "blacklist" of unenforceable terms and a "graylist" of presumptively unfair clauses.[88]

4. Consumer Financial Protection Bureau Arbitration Clauses

Providers of consumer financial products and services often include predispute mandatory arbitration clauses in their contracts.[89] Congress mandates that the Consumer Financial Protection Bureau (CFPB) assess such clauses and provide a report to Congress.[90] The CFPB noted that ToU in consumer financial products and services, which include credit cards, checking accounts, and payday loans, are ubiquitous.[91]

The CFPB determined that when compared to the rest of the credit card contract, arbitration clauses were more complicated and written at a higher grade level in almost every case.[92] "The mean Flesch readability score for credit card arbitration clauses . . . was 34.5 and the median was 33.7," while the mean score for the remainder of the contract was 52.2

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86 *Id.* at 1462 (footnotes omitted).

87 Koenig & Rustad, *supra* note 37, at 625.

88 Rustad & Koenig, *supra* note 13, at 1436 (noting that this proposal would "address the structural imbalance between social media sites currently empowered to dictate rights without remedies").

89 CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE 4 (2013) [hereinafter PRELIMINARY RESULTS], https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [https://perma.cc/7E5G-SCJV] (conducted pursuant to section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010); *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 1028, 124 Stat. 1376, 2003 (2010) (codified at 12 U.S.C. § 5518).

90 PRELIMINARY RESULTS, *supra* note 89, at 4; CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 2 (2015) [hereinafter REPORT TO CONGRESS], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/VHB5-A2HX].

91 *See* PRELIMINARY RESULTS, *supra* note 89, at 4.

92 *Id.* at 28.

and the median was 51.6.[93] In terms of the FKGL, credit card arbitration clauses had a mean grade level of 14.2 and a median of 14.7, while the remainder of the contract had a mean of 10.8 and a median of 11.[94] The CFPB found that the arbitration clauses were more difficult to read than the agreement as a whole. Moreover, the arbitration clauses were drafted at such a high reading level that only college graduates could understand the terms.[95]

Predispute mandatory arbitration clauses are controversial, as observed by the CFPB:

> Some commenters take the view that pre-dispute arbitration clauses contained in standard-form contracts are unfair to consumers. Critics generally focus on three areas. First, they attack arbitration as a dispute resolution process. They contend that it reduces or eliminates procedural protections—such as a right of appeal or access to discovery—that are generally available in court. There are also claims that arbitration may be biased against consumers, and that it may not be as fast or cheap as its proponents' claim. . . . [C]ritics [also] argue that arbitration clauses may immunize companies from a range of private civil liabilities, such as by reducing the availability of discovery or by eliminating class proceedings. According to this argument, arbitration clauses may undermine deterrence and leave widespread wrongdoing against consumers unaddressed. Finally, critics assert that arbitration, which is almost always conducted in private, undermines benefits inherent in the public nature of the court system, such as transparency and the development of clear precedents.[96]

On the other hand, advocates of predispute mandatory arbitration clauses argue that consumer arbitration is cost-effective and more efficient than litigation. Specifically, they contend that arbitration

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93 *Id.* at 28–29 (footnote omitted).

94 *Id.* at 29 ("Of the 66 contracts studied, only in three cases was the Flesch-Kincaid grade level lower for the arbitration clause than for the remainder of the contract.").

95 *See id.* at 28–29 (reporting findings of credit card agreements with arbitration clauses); *id.* ("By comparison, the mean Flesch readability score for the remainder of the contract (*i.e.*, excluding the arbitration clause) was 52.2 and the median was 51.6. The readability score for the remainder of the credit card contract exceeded the readability score for the arbitration clause in every case." (footnote omitted)); *see also* Marieke van der Rakt, *The Flesch Reading Ease Score: Why and How to Use It*, YOAST (May 20, 2019), https://yoast.com/flesch-reading-ease-score [https://perma.cc/FM7Y-VM9K] (interpreting the FRE score).

96 PRELIMINARY RESULTS, *supra* note 89, at 7–8 (footnotes omitted); *see* Omri Ben-Shahar, *CFPB Gets Ready to Prohibit Arbitration Agreements—And It Wouldn't Help Consumers*, FORBES (May 5, 2016, 5:31 PM), https://www.forbes.com/sites/omribenshahar/2016/05/05/cfpb-gets-ready-to-prohibit-arbitration-agreements-it-would-not-help-consumers/?sh=3f06bd8c64b2 [https://perma.cc/TMQ4-D5BR].

"minimizes the disruption and loss of good will that often results from litigation and . . . reduces litigation costs."[97]

The CFPB found that arbitration clauses were not only lengthy but also complex.[98] In comparing large and small issuers, the CFPB also found that:

> [A]rbitration clauses from larger issuers tended to be longer (averaging 1,329.5 words) than ones from smaller issuers (averaging 1,067.3 words), but that arbitration clauses from larger issuers tended to score better on the readability metrics than ones from smaller issuers. Thus, the Flesch-Kincaid grade level was 14.7 for arbitration clauses from large issuers as compared to 15.7 for arbitration clauses from small issuers, and one of the three largest credit card issuers used the clause with the best readability score.[99]

The CFPB researchers also concluded that the median readability of the ToU for the financial services market (excluding the arbitration clause) was approximately 52,[100] which indicates that they are fairly difficult to read.[101] The CFPB's report on the quality of the consumer credit card market stated that providers have increasingly deployed arbitration clauses in credit card agreements over the last five years.[102] "With regards to readability, the CFPB found that the 'median Flesch-Kincaid grade level of 12.4 in the 2020 data indicates fewer than half of all agreements should be readable by a high school graduate. This has

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97 PRELIMINARY RESULTS, *supra* note 89, at 8 (quoting AM. BANKERS ASS'N, CONSUMER BANKERS ASS'N & FIN. SERVS. ROUNDTABLE, COMMENTS ON REQUEST FOR INFORMATION REGARDING SCOPE, METHODS, AND DATA SOURCES FOR CONDUCTING STUDY OF PRE-DISPUTE ARBITRATION AGREEMENTS (DOCKET NO. CFPB-2012-0017) 2 (June 22, 2012), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2012/06/CFPB-Comment-Letter-62212.pdf [https://perma.cc/H8EB-9AY2]) ("Arbitration proponents also claim that these cost savings inure to the benefit of consumers through lower prices and/or expanded access. . . . [W]hile proponents of arbitration clauses may acknowledge the potential impact on class proceedings, many take the view that such proceedings typically are meritless, inefficient, and provide little or no benefit to consumers. They contend that the reduced cost of arbitration together with various provisions of arbitration clauses (including the availability of small claims court as well as contingent minimum awards in arbitration) provide ample opportunity for consumers to obtain redress for asserted wrongs that involve relatively small amounts of money." (footnotes omitted)).

98 *Id.* at 28.

99 [2018] Fed. Banking L. Rep. (CCH) ¶ 153-656 (footnote omitted).

100 PRELIMINARY RESULTS, *supra* note 89, at 28–29.

101 *See* Garger, *supra* note 32 ("A score of 100 represents the easiest to read text, and a score of 0 represents the most difficult to read text. Scores from 60 to 70 are plain English, readable by the average reader.").

102 Jonathan B. Engel & Rich Zukowsky, *Readability and Deferred Interest Remain Concerns in CFPB's Biennial CARD ACT Report*, DAVIS WRIGHT TREMAINE LLP (Oct. 21, 2021), https://www.dwt.com/blogs/financial-services-law-advisor/2021/10/cfpb--card-act-report-2021 [https://perma.cc/AS9K-RF2X].

steadily increased from a value of 12.0 in 2016.'"[103] Given that arbitration clauses foreclose the right to a jury trial, it is important that the average American adult find them to be understandable.

5. Readability of Franchise Disclosure Documents

The Federal Franchise Rule governs the franchise industry and requires franchisors to provide potential franchisees with franchise disclosure documents (FDDs). The Rule further requires that each FDD "contain twenty-three prescribed informational items about the franchise."[104] A 2018 study of 523 FDDs determined that the textual quality of such documents is often poor.[105] The study drew upon a list of 988 franchisors from a dataset using a 2017 edition of *Entrepreneur*.[106] All FDDs in the study were found to be unreadable by more than six grade levels beyond what is needed for the average American adult to comprehend the text.[107]

6. Readability of DMCA Repeat Infringer Policies

The Digital Millennium Copyright Act (DMCA) "amended U.S. copyright law to address important parts of the relationship between copyright and the internet."[108] Title II of the DMCA limits service providers' liability for copyright infringement for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information

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103 *Id.* (quoting BUREAU OF CONSUMER FIN. PROT., THE CONSUMER CREDIT CARD MARKET 123 (2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf [https://perma.cc/2X25-ETZA]).

104 Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 ALA. L. REV. 237, 245 (2018).

105 *Id.* at 239–40.

106 *Id.* at 246.

107 *Id.* at 253; Russ Garland, *Franchise Disclosure Documents Can Be Baffling*, WALL ST. J. (Apr. 30, 2018, 10:03 PM), https://www.wsj.com/amp/articles/franchise-disclosure-documents-can-be-baffling-1525140180 [https://perma.cc/J42V-K5Z7]; *cf.* Rochelle Spandorf, *Reading the FDD: The Argument Against Simplification*, FRANCHISING.COM (May 4, 2021), https://www.franchising.com/articles/reading_the_fdd_the_argument_against_simplification.html?ref=newsletter [https://perma.cc/8LLP-UAR5] (acknowledging the readability problem but explaining that "[p]roper due diligence of a complex investment is *not* something that can or should be abbreviated, condensed, or hastened").

108 *The Digital Millennium Copyright Act*, COPYRIGHT.GOV, https://www.copyright.gov/dmca [https://perma.cc/YDB8-4A9Z]; *see* 17 U.S.C. §§ 1201–1332.

location tools.[109] Internet service providers, including websites, are immunized from secondary copyright infringement claims if they designate an agent to receive notices of copyright infringement.[110]

Chapter 12 of the DMCA generally prohibits the circumvention of copyright protection systems. Section 1201 of the DMCA prohibits the manufacture of devices or tools that circumvent copyright protection devices.[111] Section 1201(b) prohibits the manufacture of circumvention devices, which bypass technical measures controlling access to copyrighted works.[112] A 2021 study of the DMCA included a sample of thirteen broadband providers that constitute eighty percent of the consumer market.[113] The principal investigator stated the DMCA study's objectives as follows:

> This study sought to identify the readability, accessibility, and clarity of ISP [(internet service provider)] policies on repeat infringers—policies by which each ISP "informs subscribers." . . . [C]omplying with the DMCA is optional; however, no ISP in this study wholly opted out of the safe harbor schema. All ISPs within the sample had some policy language relevant to the DMCA. . . . [T]he location of the repeat infringer policy varied among the posted legal documents, as did the policy details and amount of specificity. However, the readability analysis reflects that these policies were uniformly written for a sophisticated and educated audience.[114]

The service providers' DMCA policies were drafted many grade levels beyond the reading level of the typical American reader:

> For these ISP policies, the median grade level is a college graduate, and the readability score is "very difficult." The median FKGL is 16.1, ranging from 10.5 to 26.4. On the U.S. education grade level, the average policy requires at least four years of post-high school education. The median [FRE score] is 24.35, ranging from 0 to 52.8. No policy met the standard plain English reading level of 60. . . . The scores above indicate the copyright and repeat infringer provisions were written at a level suitable for subscribers with tertiary education. Therefore, nonlawyer readers would find these policies very challenging to understand. This raises the question whether average subscribers are indeed the intended audience for these policies. One

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109 17 U.S.C. § 512(a)–(d) (limiting Internet service provider liability for material found online).

110 *See id.* § 512(a) (providing a safe harbor for Internet service providers).

111 *See id.* § 1201(a) (prohibiting the distribution of devices that provide a means for infringing upon works protected under the U.S. Copyright Act).

112 *See id.* § 1201(b) (stating that the use of circumvention devices will incur liability).

113 Reid, *supra* note 35, at 411–12.

114 *Id.* at 414.

> wonders whether these unreadable policies satisfy the DMCA condition to inform subscribers.[115]

E. *Why Readability Matters*

Readability has not been given enough attention in prior literature, notwithstanding that it is "a distinct and important dimension of disclosure quality."[116] This Section of the Article demonstrates the importance of readability for consumer disclosures, which is important to most Americans, given that readability enables consumers to understand the full terms to which they are, or are not, agreeing. Unreadable consumer contracts can lead consumers to agree to one-sided clauses in browsewrap or other mass-market agreements. For example, arbitrators in consumer cases only have authority if users have agreed to submit to arbitration.[117] "While arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court."[118] As such, the unreadability of consumer contracts casts doubt on whether users have agreed to submit to arbitration, class action waivers, disclaimers of warranties, and limitations on damages to a nominal amount.

1. Social Media Rights-Foreclosure Schemes

Social networking websites deploy some of "the most widely used standard form contract[s] in world history with potentially billions of users."[119] Hundreds of social networking sites, including Facebook, utilize ToU to condition "access to digital data and information-based platforms."[120] As of the second quarter of 2022, Facebook was the most

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115 *Id.* at 419–20 (footnotes omitted).

116 Steven F. Cahan, Seokjoo Chang, Wei Z. Siqueira & Kinsun Tam, *The Roles of XBRL and Processed XBRL in 10-K Readability*, 49 J. BUS. FIN. & ACCT. 33, 33 (2021).

117 As noted by the Court of Appeals of Ohio:

> [A]rbitration is a matter of contract and, despite the strong policy in its favor, a party cannot be compelled to arbitrate any dispute that he has not agreed to submit to arbitration. This axiom "recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration."

Peabody Landscape Constr., Inc. v. Welty Bldg. Co., No. 2022 CA 00023, 2022 WL 5240506, at *4 (Ohio Ct. App. Oct. 6, 2022) (citation omitted) (quoting Grady v. Winchester Place Nursing & Rehab. Ctr., No. 08 CA 59, 2009 WL 2217733 (Ohio Ct. App. July 20, 2009)).

118 *Id.*

119 Rustad & Onufrio, *supra* note 3, at 1086.

120 *Id.*

widely used social media site worldwide, with approximately "2.93 billion monthly active users."[121]

Facebook requires all users to agree to its Terms of Service (ToS) as a condition of use.[122] Facebook's ToS reveals that the social media giant claims the right to use the personal information of its users without payment or other compensation.[123] As such, social network sites like Facebook are, in effect, schemes to foreclose the rights of their users:

> The empirical reality is that few social networking site users would be aware that they waive their implied warranty of merchantability, surrender their right to file suit in a court of law, and agree to submit to arbitration in a distant forum by the mere act of cracking open shrinkwrap, clicking on an icon labeled "I agree" or merely accessing a website. In the past fifteen years, a large number of academics have called for radical reform of standard form TOUs.[124]

2. Consumer Disclosures on Financial Statements

Precontractual disclosure gives the consumer information about the costs and benefits of products or services used by American consumers.[125] "Disclosure laws cover a wide range of products and services such as franchises, securities, employee-benefit plans, electronic fund transfers, product warranties, health plans, and consumer credits."[126] Mandatory disclosures in financial statements, such as 10-K statements, must be readable for potential investors to make informed decisions about whether to invest in a given company.

An accounting industry study "identifie[d] financial statement readability as a distinct and important dimension of disclosure quality

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121 S. Dixon, *Facebook: Quarterly Number of MAU (Monthly Active Users) Worldwide 2008–2022*, STATISTA (Aug. 22, 2022), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide [https://perma.cc/H93G-YCYP]. "Around seven-in-ten U.S. adults (69%) say they ever use Facebook, according to an early 2021 phone survey. There has been no statistically significant change in the share of adults who use the platform since 2016." John Gramlich, *10 Facts About Americans and Facebook*, PEW RSCH. CTR. (June 1, 2021), https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook [https://perma.cc/DL8L-STUL].

122 *See Terms of Service*, FACEBOOK, https://www.facebook.com/legal/terms [https://perma.cc/C35T-QXFW] (July 26, 2022).

123 *See id.* "Facebook can use any of your stuff for any reason they want without paying you, for advertising in particular." *Facebook Terms of Service (Statement of Rights and Responsibilities)*, TL;DRLEGAL, https://tldrlegal.com/license/facebook-terms-of-service-(statement-of-rights-and-responsibilities) [https://perma.cc/3EP5-8SB7].

124 Rustad & Onufrio, *supra* note 3, at 1142–43.

125 Benoliel & Zheng, *supra* note 104, at 238–39.

126 *Id.* at 239.

that has been overlooked in the prior literature."[127] The study found that many potential investors rely on the company's disclosures in regard to risk, thus highlighting the importance of readability:

> [The] interim report on critical audit matter (CAM) disclosures finds that investors are using CAMs to better understand the work of the auditor and company disclosures. Furthermore, as part of the report, a survey of investors finds that most respondents were likely to use CAMs to identify risks associated with a given company. However, the survey results indicate that just 55% of respondents viewed the CAMs as easy to understand.[128]

3. Unreadable Jury Instructions

The integrity of the jury system depends upon the readability of the jury instructions, especially considering that the average reading level of an American adult is the eighth grade.[129] However, "jury instructions are too difficult [to understand] and are thus unintelligible" to many jurors, given their poor wording and arcane meaning[130]:

> Imagine you are a layperson with an eighth-grade reading level. You are a juror in a capital murder sentencing, and life or death hinges on your determination of fact and application of the law. The judge reads the instructions, and then sends you and the other jurors to deliberate. Your decision depends on your understanding of how to apply aggravating and mitigating factors according to this sentencing instruction . . . .[131]

A juror's inability to understand jury instructions in, for example, a capital murder case has life or death consequences. This Part of the Article has given examples of why readability matters in consumer contracts where Americans inadvertently waive constitutional rights and substantive consumer protections. The U.S. Supreme Court has long

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127 Cahan, Chang, Siqueira & Tam, *supra* note 116, at 33.

128 Edward Lynch, *Making Critical Audit Matters More Readable*, J. ACCT. (Oct. 1, 2021), https://www.journalofaccountancy.com/issues/2021/oct/make-critical-audit-matters-more-readable.html [https://perma.cc/KCF5-FPAK].

129 The average American adult has an eighth-grade reading level. Approximately thirty-two million American adults cannot read, and twenty-one percent of American adults are considered illiterate, that is, having below a fifth-grade reading level. Low literacy in the United States causes problems in jury trials because pattern instructions, on average, are written at a twelfth-grade reading level.

Barnes, *supra* note 1, at 195 (footnotes omitted).

130 Bettina E. Brownstein, *It's Time to Make Jury Instructions Understandable*, ARK. LAW., Fall 2002, at 24, 24.

131 Barnes, *supra* note 129, at 194–95 (footnote omitted).

established the requirement of an intelligent waiver of constitutional rights.[132] The next Part will demonstrate that the largest American companies draft their consumer agreements many grade levels above the reading level of most U.S. consumers, so many users are not intelligently, or at all, aware that they are waiving important constitutional rights.

II. EMPIRICAL STUDY OF THE READABILITY OF TOP U.S. COMPANIES' CONSUMER CONTRACTS

In 2011, the U.S. Supreme Court legitimized the practice of imposing mandatory arbitration clauses and class action waivers in *AT&T Mobility LLC v. Concepcion*.[133] The Court "described [these] provision[s] as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.'"[134] Consumer arbitration is a forum wherein providers have significant advantages:

> Imagine a profoundly unfair legal world in which businesses redirect consumer lawsuits away from state and federal courts into secret tribunals, in which a privately hired judge decides cases without precedents and with only limited grounds for an appeal. Under secretive forced arbitration, the social media service determines the arbitral provider and selects the rules that govern disputes with consumers. Visualize further . . . legally binding terms of use (TOU) "agreements" that are seldom, if ever, read. Even if they are read, the TOU are composed of unnecessarily complex terminology, which is drafted at the comprehension level of a typical college graduate. In this dystopian legal world, users are required to waive their constitutional right to a jury trial, the right of liberal discovery, and the right of appeal by agreeing to "take-it-or-leave it" terms of use.[135]

This Part of the Article covers the largest empirical study of the legal world regarding unreadable and unfair consumer contracts.[136] Using the FRE and FKGL tests, this study measured the readability of the ToU for (1) the 100 largest U.S. retailers; (2) the 100 largest U.S. digital companies;

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132 "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case . . . ." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

133 563 U.S. 333 (2011).

134 *Id.* at 339 (first quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); and then quoting Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010)).

135 Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RSRV. L. REV. 341, 343–44 (2014) (footnotes omitted).

136 All calculations within this Part are based on the formula found in Garger, *supra* note 32.

(3) the 100 largest U.S. software companies; (4) the 50 largest U.S. banks; and (5) the 33 largest credit card companies.[137] Both tests also assessed the readability of consumer contracts employed by the largest U.S. companies.

A. *Readability of Largest Retailers' Terms of Use*

Overall, the ToU for the top 100 largest U.S. retailers were drafted at an average FKGL of 14.3 (college level) and an average FRE score of 38 (difficult). Seventy-eight of the 100 largest retailers' arbitration clauses were drafted at a readability level requiring nearly three years of college (Grade 14.7). The FRE score for the sixty-one arbitration clauses was 34, only slightly more difficult than the ToU (some college).

In contrast, the liability limitation clauses (i.e., caps on damages) were drafted at an average FKGL of 21 (equivalent to a Ph.D.) and an average FRE score of 17 (equivalent to a college graduate degree). Warranty disclaimers for the top 100 retailers were drafted at an average FKGL of 18 (equivalent to a Master's degree).[138]

Table Four below reveals the readability of the top ten U.S. retailers as ranked by 2020 sales. The ToU are drafted to be either fairly difficult or difficult to read with a range of grade level requirements between grade ten to college and beyond. Eight out of the top ten retailers drafted their standard form agreements so only a consumer with a college education could understand them.

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137 *See supra* note 11 and accompanying text. "A reading level is the level of education the average person needs to be at to understand your content. These are calculated by a number of algorithms, the most widely used being the Flesch Kincaid Reading Level." Laura Kelly, *What Is the Average Person's Reading Level?*, READABLE: READABILITY NEWS (Aug. 21, 2020), https://readable.com/blog/what-is-the-average-persons-reading-level [https://perma.cc/M7X8-B644].

138 *See* Deborah Ziff Soriano, *How Long Does It Take to Get a Master's Degree?*, U.S. NEWS & WORLD REP. (Mar. 13, 2019, 12:26 PM), https://www.usnews.com/education/best-graduate-schools/articles/2019-03-13/how-long-does-it-take-to-get-a-masters-degree (last visited Nov. 27, 2022) ("The classic master's degree model of 'going to graduate school,' where someone stops working and focuses on being a full-time student, often takes about two years." (quoting Sean Gallagher, Exec. Dir., Ctr. for the Future of Higher Educ. & Talent Strategy, Ne. Univ.)).

Table Four: Readability of Top Ten Retailers' Terms of Use[139]

Company Name	*FKGL Required to Read ToU*	*FRE Score*
Walmart[140]	13.5 (College)	40 (Difficult to Read)
Amazon[141]	10.3 (10th Grade)	50 (Fairly Difficult to Read)
Kroger[142]	13.6 (College)	41 (Difficult to Read)
The Home Depot[143]	15.2 (College)	39 (Difficult to Read)
Costco Wholesale[144]	11.8 (12th Grade)	43 (Difficult to Read)
Walgreens Boots Alliance[145]	17.4 (College Graduate and Above)	30 (Difficult to Read)
Target[146]	17.0 (College Graduate and Above)	30 (Difficult to Read)
CVS Health Corporation[147]	17.0 (College Graduate and Above)	28 (Very Difficult to Read)
Lowe's Companies[148]	15.9 (College)	34 (Difficult to Read)
Albertsons Companies[149]	12.9 (College)	43 (Difficult to Read)

Eight out of the ten leading retailers drafted their standard form agreements at a level only understood by consumers with a college education. None of these retailers drafted their ToU to be understood by

139 *Top 100 Retailers 2021 List*, *supra* note 11.

140 *Walmart.com Terms of Use*, WALMART, https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0 [https://perma.cc/KD2W-PVHE] (Aug. 22, 2022).

141 *AWS Service Terms*, AWS, https://aws.amazon.com/service-terms [https://perma.cc/TZ9S-DSSW] (Nov. 4, 2022).

142 *Website and App Terms & Conditions of Use*, KROGER, https://www.kroger.com/i/terms/website-and-app (Jan. 2020) (last visited Oct. 10, 2022).

143 *Terms and Conditions*, HOME DEPOT, https://www.homedepot.com/hdus/en_US/DTCCOMNEW/fetch/Global_Assets/PDFs/MOB-06-23-14-through-10-15-17-MR.pdf [https://perma.cc/99EK-9PEN].

144 *Terms and Conditions of Use*, COSTCO WHOLESALE, https://www.costco.com/terms-and-conditions-of-use.html?&reloaded=true (Aug. 3, 2021) (last visited Oct. 10, 2022).

145 *Terms of Use*, WALGREENS BOOTS ALL., https://www.walgreensbootsalliance.com/terms-use [https://perma.cc/5HPC-494T] (Nov. 2019).

146 *Terms & Conditions*, TARGET, https://www.target.com/c/terms-conditions/-/N-4sr7l?Nao=0 [https://perma.cc/BH8B-DDC2] (Sept. 9, 2022).

147 *CVSHealth.com: Notice of Terms of Use*, CVSHEALTH (Aug. 9, 2016), https://www.cvshealth.com/terms-of-use [https://perma.cc/Y53K-7FGU].

148 *Terms and Conditions of Use*, LOWE'S, https://www.lowes.com/l/about/terms-and-conditions-of-use [https://perma.cc/3T9G-DDHD].

149 *Terms of Use*, ALBERTSONS COS., https://www.albertsonscompanies.com/about-us/our-policies/terms-of-use.html [https://perma.cc/RDV7-2UZJ] (Dec. 22, 2021); *see New 'TLDR' Bill Requires Companies Provide Synopsis of Overlong, Predatory Terms of Service*, ABOVE THE L. (Jan. 14, 2022, 5:17 PM), https://abovethelaw.com/2022/01/new-tldr-bill-requires-companies-provide-synopsis-of-overlong-predatory-terms-of-service [https://perma.cc/UWA4-W8K9].

the average American adult, who reads at an eighth-grade level. Only those with a college degree or beyond were able to decipher Walgreens Boots Alliance, Target, CVS, and Lowe's Companies' ToU, nine grade levels higher than what the average American adult can comprehend. Overall, the ten largest retailers missed the readability mark by a wide margin.[150]

B. *Readability of Top Digital Companies' Consumer Contracts*

The readability scores of ToU for companies listed on *Forbes*' list of the top 100 digital companies reveals that their terms are written at a college level.[151] The FRE score for these companies was 38.3, which is classified as difficult to read. When applying the FKGL formula, these companies' terms were written at a Grade 14 level (some college), six grade levels above the average reading level of U.S. adults.[152]

The contracts for the ten largest digital companies demonstrated a wide range in readability: Apple (Grade 17.2), Microsoft (Grade 8.7), Samsung Electronics (Grade 12.2), Alphabet-Google (Grade 15.9), AT&T (Grade 12.1), Amazon (Grade 9.5), Verizon (Grade 18.5), China Mobile (Grade 12.5), Walt Disney (Grade 16.5), and Facebook (Grade 12.7).[153] Microsoft was the only top digital company with ToU comprehensible to the average American adult. Accordingly, as with the largest retailers, the

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150 *See infra* Table 7.

151 *Top 100 Digital Companies*, *supra* note 11.

152 *See FRE & FKGL*, *supra* note 30 ("The Flesch Kincaid Grade Level is a widely used readability formula which assesses the approximate reading grade level of a text. It was developed by the US Navy who worked with the Flesch Reading Ease. Previously, the Flesch Reading Ease score had to be converted via a table to translate to the reading grade level. The amended version was developed in the 1970s to make it easier to use. The Navy utilised it for their technical manuals used in training."); *Top 100 Digital Companies*, *supra* note 11.

153 The complete list of the top 100 digital companies includes: Apple, Microsoft, Samsung Electronics, Alphabet-Google, AT&T, Amazon, Verizon, China Mobile, Walt Disney, Facebook, Alibaba, Intel, Softbank, IBM, Tencent Holdings, Nippon Telegraph & Telephone Corp. (NTT), Cisco Systems, Oracle, Deutsche Telekom, Taiwan Semiconductor, KDDI, SAP, Telefónica, América Móvil, Hon Hai Precision, Dell Technologies, Orange, China Telecom, SK Hynix, Accenture, Broadcom, Micron Technology, Qualcomm, PayPal, China Unicom, HP, Bell (BCE), Tata Consultancy Services, Automatic Data Processing (ADP), BT Group, Mitsubishi Electric, Canon, Booking Holdings, Saudi Telecom Co., JD.com, Texas Instruments, Netflix, Phillips, Etisalat, Baidu, ASML Holding, Salesforce, Applied Materials, Recruit Holdings, Singtel, Adobe, Xiaomi, Telstra, Vmware, TE Connectivity, SK Holdings, Murata Manufacturing, Cognizant, NVIDIA, eBay, Telenor, Vodafone, SK Telecom, Vivendi, Naspers, Infosys, China Tower Corp., Swisscom, Corning, Fidelity National Information, Rogers Communications, Nintendo, Kyocera, NXP Semiconductors, DISH Network, Rakuten, Altice Europe, TELUS, Capgemini, Activision Blizzard, Analog Devices, Lam Research, DXC Technology, Legend Holdings, Lenovo Group, NetEase, Tokyo Electron, Keyence, Telkom Indonesia, Nokia, Fortive, Ericsson, Fiserv, Fujitsu, and Hewlett Packard Enterprise. *Top 100 Digital Companies*, *supra* note 11.

top ten retailers drafted their consumer contracts to be incomprehensible to most U.S. consumers.

C. *Readability of Software Licenses*

The readability of the ToU for the 100 largest software companies reveals a comparable pattern of poor readability to that of the 100 largest retailers and the 100 largest digital companies.[154] The top ten software companies drafted their terms so that they were understandable by readers with a wide range of education, from Grade 9 to beyond a college level. The reading level necessary to understand these companies' terms was a year and a half of college (Grade 13.5), five and a half years beyond the reading level of the average American adult.

The 100 largest software companies also drafted their consumer contracts to require a minimum reading level of two or more years of college education (Grade 14). Thus, software license agreements were drafted six grade levels beyond what the average U.S. adult would comprehend. The average FRE score was 38.3, which is difficult to read, requiring a college education. The plain English standard is 60 to 70, demonstrating that the readability of software licenses surpasses the readability benchmark for average U.S. adults by a wide margin.[155]

The ease with which a reader can understand a software license or ToU is vital to American consumers who are asked to waive important rights. However, the software industry substantially misses the readability mark.

D. *Readability of Largest Banks' Customer Agreements*

The average FRE score of the fifty largest U.S. banks' agreements was 41.9, revealing that these agreements are easier to read than that of the top 100 retailers, digital companies, and software license agreements.[156]

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154 *Id.*

155 *What Is Flesch Reading Ease Score?*, CHARACTER CALCULATOR, https://charactercalculator.com/flesch-reading-ease/#:~:text=The%20Flesch%20reading%20ease%20score%20indicates%20the%20understandability,the%20content%20is%20easy%20to%20read%20and%20understand [https://perma.cc/JP4A-WZHU] (stating that FRE scores of 60 to 70 are the plain English standard and require an eighth- or ninth-grade education, whereas FRE scores of 30 to 50 require a college education); *see also* Garger, *supra* note 32.

156 The FKGL and FRE scores for the top U.S. banks and financial institutions included scores for the following: JPMorgan Chase, Bank of America Corp., Citigroup Inc., Wells Fargo & Co., Goldman Sachs, Morgan Stanley, Charles Schwab, U.S. Bancorp, Truist Financial Corp., PNC

On average, these banks drafted their consumer contracts at a Grade 16.3 level, eight grade levels above the average U.S. adult's reading level.[157]

E. *Largest Credit Card Providers' Agreements*

The nine largest credit card companies in the sample represented over two-thirds, or 72.3%, of the industry: Chase (16.6%), Citigroup (11.6%), American Express (11.3%), Bank of America (10.7%), Capital One (10.5%), Discover (7.6%), Wells Fargo (4.3%), U.S. Bank (4.1%), and Barclay's (2.6%).[158] These companies' credit card agreements were more comprehensible than every other sample, except banking agreements. On average, they were drafted at a tenth-grade level (Grade 10.4), which is identical to the average reading level of the thirty-three largest credit card companies described in Table Five below.

F. *Summary of Readability of the Largest U.S. Companies' Terms of Use*

Table Five below presents the FRE and FKGL scores for the 100 largest retailers, the 100 largest digital companies, the 100 largest software companies, the 50 largest banks, and the 33 largest credit card companies. The National Retail Federation (NRF)'s list of the 100 largest retailers ranks the industry's largest companies according to sales, with Walmart at the top and Amazon in second place.[159] Walmart had $543.17 billion

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Financial Services, TD Group US Holding, Bank of New York Mellon, Capital One Financial Corp., State Street Corp., HSBC North America, Citizens Financial Group, SVB Financial Group, UBS Americas Holding, Fifth Third Bancorp, United Services Automobile Assoc., American Express Co., M&T Bank Corp., First Republic Bank, BMO Financial Corp., KeyCorp, Ally Financial, Huntington Bancshares, Barclays US LLC, Santander Holdings USA, RBC US Group Holding, Regions Financial Corp., Ameriprise Financial, Northern Trust Corp., MUFG Americas Holdings, BNP Paribas USA, DB USA Corp., Signature Bank, Discover Financial Services, First Citizens Bancshares, Synchrony Financial, Credit Suisse Holdings (USA), Zions Bancorporation N.A., Comerica Inc., Raymond James Financial Inc., First Horizon Corp., Popular, Inc., Webster Financial Corp., Western Alliance Bancorp, CIBC Bancorp USA, and New York Community Bancorp. *Top 50 Banks in America*, *supra* note 11.

157 *See What's the Latest U.S. Literacy Rate?*, *supra* note 1.

158 Lyle Daly, *The 5 Most Popular Credit Card Companies*, ASCENT (Sept. 16, 2021), https://www.fool.com/the-ascent/credit-cards/articles/5-most-popular-credit-card-companies [https://perma.cc/CCZ9-ZZWE].

159 Sandy Smith, *2021 Top 100 Retailers*, NRF (July 6, 2021), https://nrf.com/blog/2021-top-100-retailers [https://perma.cc/Y6ZE-QY66] ("The Top 100 roster is based on sales rankings for 2020. While pandemic-related lockdowns negatively impacted some retailers, others were able to benefit: Grocers like Publix, Aldi and H-E-B all moved up in the rankings, as did The Home Depot and Target. Those taking a hit included retailers like TJX Companies and Macy's.").

in 2020 worldwide retail sales, followed by Amazon with $263.16 billion.[160] The 100 largest retailers had a mean income of $3 billion in 2020 retail sales.[161] The ToU for the 100 largest digital companies were written at a Grade 14 level. Thus, readers of these retailers' contracts would need to have a minimum of fourteen years of education.[162]

160 *Top 100 Retailers 2021 List*, *supra* note 11.

161 *See id.*

162 *See FRE & FKGL*, *supra* note 30.

Table Five: Summary of Readability of Large Providers Terms of Use

Sample of Consumer Contracts	*Description*	*Readability of ToU*
One Hundred Largest U.S. Retailers[163]	The NRF's Top 100 Retailers list ranks the industry's largest companies according to sales and "remain[s] relatively stable. Walmart continues at the top, where it has been comfortably ensconced. Amazon remains in second place."[164]	FRE score: 38 (difficult to read, best understood by college graduates) FKGL: 14 (2 years of college, 6 grade levels beyond the average U.S. adult reading level)[165]
One Hundred Largest Digital Companies [166]	The Forbes Top 100 List includes Apple, Microsoft, Samsung, Alphabet, AT&T, Amazon, Verizon, China Mobile, Walt Disney, and Facebook.	FRE score: 38 (difficult to read, best understood by college graduates) FKGL: 14 (2 years of college, 6 grade levels beyond the average U.S. adult reading level)
One Hundred Largest Software Companies[167]	The Top 100 Software Companies of 2021 list is "comprised of a wide range of companies from the most well-known such as Microsoft, Adobe, and Salesforce to the relatively newer but rapidly growing—Qualtrics, Atlassian, and Asana."[168]	FRE score: 37 (difficult to read, best understood by college graduates) FKGL: 14 (2 years of college, 6 grade levels beyond the average U.S. adult reading level)
Fifty Largest U.S. Banks[169]	The 50 largest banks were holding companies with reported total assets greater than $10 billion.	FRE score: 43 (difficult to read, best understood by college graduates) FKGL: 13.3 (1 year of college, 5 grade levels beyond average U.S. adult reading level)

163 *Top 100 Retailers 2021 List*, *supra* note 11.

164 Smith, *supra* note 159.

165 *See* CECILIA C. DOAK, LEONARD G. DOAK & JANE H. ROOT, TEACHING PATIENTS WITH LOW LITERACY SKILLS 3 (2d ed. 1996) (noting that one in five American adults read at the fifth-grade level or less).

166 *Top 100 Digital Companies*, *supra* note 11.

167 *The Top 100 Software Companies of 2021*, *supra* note 11.

168 *Id.*

169 *Large Holding Companies*, FED. FIN. INSTS. EXAMINATION COUNCIL, https://www.ffiec.gov/npw/Institution/TopHoldings [https://perma.cc/9ZNS-QARM] (data listed by selecting a "Reporting Date" of March 31, 2022).

Thirty-Three Largest Credit Card Providers[170]	The 33 largest credit card companies account for 88% of the industry.[171]	FRE score: 42 (difficult to read, best understood by college graduates) FKGL: 10.4 (2 grade levels beyond the average U.S. adult)

The readability samples summarized in Table Five above represent the most extensive empirical investigation of the readability of ToU conducted to date. The major finding that the FRE scores demonstrate is that terms are difficult to read. Banks had the best readability score of 43, followed by credit card companies with 42. The readability of the ToU for the 100 largest digital retailers and the 100 largest retailers was 38. The terms for software companies were the most difficult to read, with an FRE score of 37.

The FRE scores for all of these groups were within five points of each other in the "difficult to read" category. Given that the desired FRE score ranges from 60 to 69, it is clear that these large companies drafted documents to be indecipherable for many American adults.[172] Similarly, the average FKGL for these providers' agreements was Grade 14, a full six grade levels beyond what average U.S. adults are able to comprehend.

Next, consumer agreements for the fifty largest banks were drafted at an average Grade 13 level, five grade levels above what the average American adult can comprehend. The ten largest credit card providers accounted for 82% of the market share.[173] Consumer contracts in all five samples failed the standard readability test by a wide margin.

So far, Part II has demonstrated that the largest U.S. companies systematically draft their consumer contracts to be incomprehensible to the average user, yet consumers are presumed to have read and understood the terms. If mass-market ToU are not drafted in easy-to-read language, consumers will have no meaningful opportunity to understand the rights they are waiving—including their constitutional

170 Christy Rodriguez, *U.S. Credit Card Market Share by Network & Issuer—Facts & Statistics*, UPGRADEDPOINTS (June 28, 2022), https://upgradedpoints.com/credit-cards/us-credit-card-market-share-by-network-issuer [https://perma.cc/QS4Z-MGHZ] ("In terms of purchasing volume, Visa is the clear leader at almost $2 trillion in 2020. Mastercard is the second-closest competitor at $837 billion. American Express and Discover round out the networks at $693 billion and $149 billion, respectively.").

171 McCann, *supra* note 11.

172 "Scores between 90.0 and 100.0 are considered easily understandable by an average 5th grader. Scores between 60.0 and 70.0 are considered easily understood by 8th and 9th graders. Scores between 0.0 and 30.0 are considered easily understood by college graduates." *The Flesch Reading Ease Readability Formula*, READABILITY FORMULAS, https://readabilityformulas.com/flesch-reading-ease-readability-formula.php [https://perma.cc/FHA4-BPDH].

173 Rodriguez, *supra* note 170.

right to a jury trial, as well as their contractual right to a minimum adequate remedy—before entering into contracts with America's largest companies.

G. *Readability of Rights-Foreclosure Clauses*

The readability of rights-foreclosure clauses—notably, the liability limitation clauses and arbitration anti-class action clauses for the 100 largest retailers, the 100 largest digital companies, the 100 largest software companies, the 50 largest banks, and the 33 largest credit card companies—are even more incomprehensible than the consumer agreements as a whole. The ToU agreements utilized by these entities are "boilerplate rights deletion schemes" "masquerad[ing] in the clothing of contract."[174]

1. Types of Rights-Foreclosure Clauses

The largest American companies have created a "'coercive contracting environment' because of aggressive terms disclaiming warranties and limiting liability."[175] Increasingly, these companies are imposing upon customers predispute arbitration clauses, coupled with anti-class action clauses. These one-sided clauses, which "have the effect of depriving users of a meaningful right to redress," often include "unbalanced features, such as pro-provider choice-of-forum and choice-of-law clauses" that "shield the provider by imposing warranty limitations, anti-class action waivers, and hard caps on total recovery that make pursuing arbitration cost prohibitive."[176] This Section of the Article demonstrates that rights-foreclosure clauses are drafted to be even more unreadable than consumer contracts as a whole.

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174 Michael L. Rustad, Wenzhuo Liu & Thomas H. Koenig, *Destined to Collide? Social Media Contracts in the U.S. and China*, 37 U. PA. J. INT'L L. 647, 708 & n.300 (2015) (quoting MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 39–40, 204 (2013) (explaining how boilerplate rights deletion schemes cancel or withdraw rights, including warranties or remedies under Article 2 of the Uniform Commercial Code)).

175 *Id.* (quoting RADIN, *supra* note 174, at 39–40, 204).

176 Rustad & Koenig, *supra* note 13, at 1435.

2. Caps on Damages Clauses

Table Six: Caps on Damages Clauses

Sample of Consumer Contracts	*Readability of Liability Limitation Clauses*	*Readability of ToU*	*Difference in Grade Levels Between Liability Limitation Clause & ToU*
One Hundred Largest U.S. Retailers[177]	N=84 FRE score: 17 (very confusing, beyond the reading level of college graduates) FKGL: 21	N=84 FRE score: 38 (difficult to read, best understood by college graduates) FKGL: 14	7 Grade levels
One Hundred Largest Digital Companies[178]	N=75[179] FRE score: 21 (very confusing) FKGL: 20	FRE score: 38 (difficult) FKGL: 14	6 Grade levels
One Hundred Largest Software Companies[180]	N=80[181] FRE score: 21 (very confusing) FKGL: 20	FRE score: 38 (difficult) FKGL: 14	6 Grade levels
Fifty Largest U.S. Banks[182]	FRE score: 14 (very confusing) FKGL: 22	FRE score: 42 (difficult) FKGL: 13	9 Grade levels

Table Six above summarizes the readability of caps on damages provisions deployed by the largest U.S. companies. Eighty-four percent of the 100 largest U.S. retailers imposed caps on damages by limiting liability. Nine of the ten largest retailers cap damages at a nominal amount, or zero dollars as in Walmart's consumer contract below. "Walmart, the multinational retail corporation that operates hypermarkets, discount department stores and grocery stores, remains

177 *Top 100 Retailers 2021 List*, *supra* note 11.

178 *Top 100 Digital Companies*, *supra* note 11.

179 Nineteen of the seventy-five had no liability limitation clauses, while six had a liability limitation clause of less than 100 words, which is too few words to be measured by the Flesch-Kincaid tests.

180 *The Top 100 Software Companies of 2021*, *supra* note 11.

181 Eighteen of the software companies' ToU did not have a limited liability clause, while two were under 100 words so they, too, could not be assessed using the Flesch-Kincaid tests.

182 *See Large Holding Companies*, *supra* note 169 (detailing the fifty largest banks).

the largest retailer in the world, posting record annual revenue of US$559 billion, a rise of US$35 billion [from] 2019."[183] Walmart drafted its liability limitation clause at a Grade 27 level and caps damages at zero, disclaiming every conceivable theory of liability:

> YOU ACKNOWLEDGE AND AGREE THAT, TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, WALMART ENTITIES WILL NOT BE LIABLE TO YOU OR TO ANY OTHER PERSON UNDER ANY CIRCUMSTANCES OR UNDER ANY LEGAL OR EQUITABLE THEORY, WHETHER IN TORT, CONTRACT, STRICT LIABILITY, OR OTHERWISE, FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL LOSSES OR DAMAGES OF ANY NATURE EVEN IF AN AUTHORIZED REPRESENTATIVE OF A WALMART ENTITY HAS BEEN ADVISED OF OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES. TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, THIS DISCLAIMER APPLIES TO, BUT IS NOT LIMITED TO, ANY DAMAGES OR INJURY ARISING FROM ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECTS, DELAY IN OPERATION OR TRANSMISSION, LOST PROFITS, LOSS OF GOODWILL, LOSS OF DATA, WORK STOPPAGE, ACCURACY OF RESULTS, COMPUTER FAILURE OR MALFUNCTION, COMPUTER VIRUSES, FILE CORRUPTION, COMMUNICATION FAILURE, NETWORK OR SYSTEM OUTAGE, THEFT, DESTRUCTION, UNAUTHORIZED ACCESS TO, ALTERATION OF, LOSS OF USE OF ANY RECORD OR DATA, AND ANY OTHER TANGIBLE OR INTANGIBLE LOSS. SUBJECT TO THE FOREGOING, TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, NO WALMART ENTITY WILL BE LIABLE FOR ANY DAMAGES IN EXCESS OF THE FEES PAID BY YOU IN CONNECTION WITH YOUR USE OF THE WALMART SITES DURING THE SIX (6) MONTH PERIOD PRECEDING THE DATE ON WHICH THE CLAIM AROSE.
>
> YOU SPECIFICALLY ACKNOWLEDGE AND AGREE THAT, TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, NO WALMART ENTITY WILL BE LIABLE FOR ANY DEFAMATORY, OFFENSIVE, OR ILLEGAL CONDUCT OF ANY SELLER (INCLUDING ANY MARKETPLACE RETAILER), SHOPPER, OR OTHER USER OF THE WALMART SITES.[184]

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183 Ian Horswill, *Record-Breaking Walmart Remains World's Biggest Retailer*, CEO MAG. (Feb. 19, 2021, 12:08 PM), https://www.theceomagazine.com/business/finance/walmart [https://perma.cc/TW4R-QHYM].

184 *Walmart.com Terms of Use*, *supra* note 140.

CVS's liability limitation clause, written at a Grade 21 level, caps damages at $25 or the fees paid:

> ANY LIABILITY ON THE PART OF THE CVS PARTIES, IN THE AGGREGATE, SHALL NOT EXCEED THE FEES PAID BY YOU SOLELY FOR THE RIGHT TO USE THE PARTICULAR INFORMATION OR SERVICE PROVIDED BY CVS HEREUNDER OR $25, WHICHEVER IS GREATER.[185]

Costco Wholesale, the fourth largest U.S. retailer as of 2021, drafted its liability limitation clause at a Grade 28 level and caps aggregate liability at $100.[186] Importantly, Walgreens Boots Alliance's liability limitation clause, which caps damages at $0, was an indecipherable clause, drafted at a Grade 29 level.[187] Moreover, the liability limitation clauses of the ten largest U.S. retailers were drafted at an average grade level of 21—thirteen grade levels above the reading level of the average American adult and seven grade levels above the ToU as a whole. As such, the vast majority of Americans will not be able to understand Walgreens' rights-foreclosure clauses.

Turning to the ten largest digital companies, the readability of their ToU were as follows: Apple (Grade 17), Microsoft (Grade 9), Samsung Electronics (Grade 12), Alphabet-Google (Grade 16), AT&T (Grade 12), Amazon (Grade 10), Verizon (Grade 19), China Mobile (Grade 13), Walt Disney (Grade 17), and Facebook (Grade 13). Moreover, the average grade level for these companies' terms was 14, and like the 100 largest retailers, they drafted their liability limitation clauses to be even more incomprehensible than the ToU as a whole.

Next, the 100 largest retailers drafted their liability limitation clauses with an average FRE score of only 34, missing the 70 mark by 36 points. The average grade level for these retailers' clauses was 20, twelve grade levels higher than what can be understood by the average U.S. adult. Additionally, the 100 largest digital companies drafted their liability limitation clauses at an average grade level of 20 (equivalent to a Ph.D. or other professional degree) with an average FRE score of 21 (very confusing).

The 100 largest software companies drafted their consumer contracts at an average grade level of 14. As with the online retailers and digital companies, their liability limitation clauses were drafted to be indecipherable at an average grade level of 20. The fifty largest banks had the greatest discrepancy between the readability of their ToU and liability

185 *CVSHealth.com: Notice of Terms of Use*, *supra* note 147.

186 *Terms and Conditions of Use*, *supra* note 144.

187 *Terms of Use*, *supra* note 145.

limitation clauses—a difference of nine grade levels.[188] Their liability limitation clauses were drafted at a level understood only by someone with a Ph.D. or other professional degree, far beyond the reading level of the average American adult.

The objective reality is that few Americans have any prospect of understanding rights-foreclosure clauses, given that they are drafted to be indecipherable. When ordinary Americans have no reasonable opportunity to understand consumer contracts because they are unreadable, they will forfeit important consumer rights as well as constitutional protections. American businesses should have a nondisclaimable duty to make legally binding agreements understandable. If Americans have a duty to read these agreements, companies should have a duty to make them readable.

3. Predispute Mandatory Arbitration Clauses

A predispute mandatory arbitration clause is a clause in which a provider requires users to agree to waive their right to a jury or court trial. Instead, users are forced to submit to an arbitration proceeding where the courts' usual rules of evidence, discovery, and procedural protections are not followed. A growing number of ToU include predispute mandatory arbitration clauses requiring hearings to be conducted in the provider's home forum and shifting the cost of air travel, hotels, and other expenses onto the consumer.[189] Under these imbalanced clauses, predispute mandatory arbitration creates a liability-free zone for an increasing number of U.S. companies:

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188 Credit card companies do not incorporate liability limitation clauses into their agreements and thus are not included in this analysis.

189 *See* Rustad & Koenig, *supra* note 13, at 1435, 1492–93; Michael L. Rustad, Richard Buckingham, Diane D'Angelo & Katherine Durlacher, *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 644 (2012) ("Over the past few years, a quiet revolution has begun as many social networking sites (SNSs) impose predispute mandatory arbitration on consumers. Senator Patrick Leahy (D. Vt.) stated, 'Mandatory arbitration makes a farce of the right to a jury trial and the due process guaranteed to all Americans.'" (quoting *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 112 (2011) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary))).

> "[A]rbitration clauses deprive consumers of certain legal protections available in court, and may serve to quash a dispute rather than provide an alternative way to resolve it." Forced arbitration . . . disadvantages consumers by creating a repeat player bias, capping award size, allowing evidence to be concealed, employing clandestine proceedings, suppressing claims and prohibiting an appellate court review to reverse or modify an arbitrator's erroneous decision.[190]

The CFPB has compared court actions to class actions, which "establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits. . . . [Thus], they improve access to the courts"[191]:

> [T]he federal court system and most state court systems provide for a class action process in which, in defined circumstances, one or more plaintiffs may file suit on behalf of similarly-situated individuals. If such an action is certified by the court as meeting the criteria for a class action and plaintiffs prevail or secure a settlement, all members of the class—for example, customers of a company who have been adversely affected by a particular practice—may be eligible to obtain relief without initiating their own lawsuits. Conversely, if the defendant prevails in a certified class action, all members of the class may be bound by the decision and thereby precluded from initiating their own lawsuits with respect to the claims at issue in the class case.[192]

The U.S. Supreme Court has held that the Federal Arbitration Act does not permit a court to strike down anti-class action clauses, even if the possible recovery has been capped below the minimum costs of pursuing the dispute.[193] After the Court's decision, many large companies now incorporate predispute mandatory arbitration clauses coupled with class action waivers in their consumer contracts.

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190 Koenig & Rustad, *supra* note 135, at 350 (footnote omitted) (quoting Richard Cordray, Prepared Remarks at the Field Hearing on Arbitration (Dec. 12, 2013), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-richard-cordray-at-the-field-hearing-on-arbitration [https://perma.cc/6XD6-EBVA]).

191 Darling v. Champion Home Builders Co., 638 P.2d 1249, 1252 (Wash. 1982) (citing 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1754, at 543 (1972)).

192 O. TOM THOMAS, BANK COMPLIANCE GUIDE ¶ 102-375 (2015), 2015 WL 12736587.

193 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013). "[C]ourts must place arbitration agreements on an equal footing with other contracts." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). And thus "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Express Co.*, 570 U.S. at 233 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

For example, Walmart predicates its users' agreement to arbitrate on using or accessing its site and couples this arbitration clause with an anti-class action clause:

> Using or accessing the Walmart Sites constitutes your acceptance of this Arbitration provision. Please read it carefully as it provides that you and Walmart will waive any right to file a lawsuit in court or participate in a class action for matters within the terms of the Arbitration provision.
>
> EXCEPT FOR DISPUTES THAT QUALIFY FOR SMALL CLAIMS COURT, ALL DISPUTES ARISING OUT OF OR RELATED TO THESE TERMS OF USE OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND WALMART, WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL THEORY, WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY, AND YOU AGREE THAT WALMART AND YOU ARE EACH WAIVING THE RIGHT TO SUE IN COURT AND TO HAVE A TRIAL BY A JURY. YOU AGREE THAT ANY ARBITRATION WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED AND YOU ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION. The arbitration will be administered by Judicial Arbitration Mediation Services, Inc. ("JAMS") pursuant to the JAMS Streamlined Arbitration Rules & Procedures effective July 1, 2014 (the "JAMS Rules") and as modified by this agreement to arbitrate. The JAMS Rules, including instructions for bringing arbitration, are available on the JAMS website at http://www.jamsadr.com/rules-streamlined-arbitration. The Minimum Standards are available at http://www.jamsadr.com/consumer-arbitration.[194]

The arbitration clauses of some of the largest U.S. companies frequently specified commercial rules of arbitration rather than consumer rules, even though most disputes will be with consumers. None of the nine digital companies choosing the American Arbitration Association (AAA) specified that the consumer rules apply. Digital providers also chose the following arbitral providers: JAMS; the Hong Kong International Arbitration Centre; International Arbitration Rules of the Korean Commercial Arbitration Board; and the Arbitration Act; 1991 (Ontario). The AAA recognizes a dual-track system for arbitration depending upon whether it is business-to-business, where the Commercial Dispute Resolution Procedures apply, or business-to-

194 *Walmart.com Terms of Use*, *supra* note 140.

consumer, where Supplementary Procedures for Consumer-Related Disputes are followed.[195]

The AAA rules state that "[i]f there is a difference between the Commercial Dispute Resolution Procedures and the Supplementary Procedures, the Supplementary Procedures will be used."[196] Under the AAA's commercial arbitration rules, the minimum fees under the Standard Fee Schedule for any case having three or more arbitrators are $4,400 for the Initial Filing Fee and $3,850 for the Final Fee; and under the Flexible Fee Schedule, the minimum fees are $2,200 for the Initial Filing Fee, $3,300 for the Proceed Fee, and $3,850 for the Final Fee.[197] Further, the commercial fees "do not cover the cost of hearing rooms, which are available on a rental basis" and are shared by the parties.[198] JAMS also states that it will not administer consumer arbitration unless its minimum standards of fairness are adopted.[199]

Given the common use of binding predispute mandatory arbitration clauses, Table Seven below provides a summary of the readability of such clauses for the 100 largest retailers, the 100 largest digital companies, the 100 largest software companies, the fifty largest banks, and the thirty-three largest credit card companies.

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195 Thomas L. Gravelle & Mary A. Bedikian, *Supplementary Procedures for Consumer-Related Disputes*, at app. 62C.XI:N, *in* 8B MICH. PLEADING & PRAC. (2d ed. 2022).

196 *Id.*

197 *Commercial Arbitration Rules and Mediation Procedures: Administrative Fee Schedules*, AM. ARB. ASS'N 2 (May 1, 2018), https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf [https://perma.cc/TGG9-WDGB].

198 *Id.*

199 JAMS, JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 3 (2009), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf [https://perma.cc/2ALB-MPU3].

Table Seven: Readability of Predispute Mandatory Arbitration Clauses

Sample of Consumer Contracts	*FRE Score for Arbitration Clauses*	*FKGL for Arbitration Clauses*	*ToU as a Whole (N=100)*
One Hundred Largest Retailers	38 (N=61)	14	FRE score: 38 FKGL: Grade 14
One Hundred Largest Digital Companies	35 (N=31)	15	FRE score: 38 FKGL: Grade 14
One Hundred Largest Software Companies	37 (N=35)	14	FRE score: 38 FKGL: Grade 14
Fifty Largest Banks	42 (N=26)	16	FRE score: 42 FKGL: Grade 13
Thirty-Three Largest Credit Card Companies	38 (N=19)	14	FRE score: 55 FKGL: Grade 14

Table Seven above reveals that predispute mandatory arbitration clauses were drafted at a reading level slightly higher than the ToU as a whole, and the FRE scores for both arbitration clauses and the ToU as a whole indicate that they are difficult to read. Further, arbitration clauses, as well as the mass-market licenses, were drafted six grade levels beyond what the average American adult can understand.

The Pew Research Internet Project found that 71% of Facebook users had a high school education or less,[200] which is too low to comprehend the websites' ToU. Not only are arbitration clauses unreadable, but they also foreclose the possibility of any meaningful remedy, given that the vast majority of the largest U.S. companies cap damages at a nominal amount that is significantly lower than the consumer's cost of filing, which is $200 under the AAA[201] and $250 under JAMS.[202] This is, in effect, a no-liability zone because consumers will not file claims where the cost of arbitration exceeds the potential recovery.

4. Readability of Warranty Disclaimer Clauses

U.S. companies typically disclaim all implied warranties. Specifically, licensors disclaim implied warranties including the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. "To disclaim or modify the implied warranty [of merchantability], language must mention 'merchantability' or 'quality' or

200 Duggan & Smith, *supra* note 48.

201 AM. ARB. ASS'N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES 12 (2014), https://www.adr.org/sites/default/files/Consumer-Related%20Disputes%20Supplementary%20Procedures%20Sep%2015%2C%202005.pdf [https://perma.cc/MTN5-9AET].

202 JAMS, *supra* note 199, at 3.

use words of similar import and, if in a record, must be conspicuous."[203] In addition, written disclaimers must be conspicuous to be effective.[204] As with Article 2 of the Uniform Commercial Code (UCC), "disclaimers will be effective if the licensor demands that the software be tested and the licensee fails to do testing in a timely manner."[205]

The largest U.S. companies eliminate all warranties with far-reaching disclaimers. For example, Walmart's warranty disclaimer clause states:

> THE WALMART SITES, AND ALL CONTENT, MATERIALS, PRODUCTS, SERVICES, FUNCTIONALITY, AND OTHER ITEMS INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE WALMART SITES, AND/OR WALMART STORE LOCATIONS, ARE PROVIDED BY WALMART ON AN "AS IS" AND "AS AVAILABLE" BASIS. NO WALMART ENTITY MAKES ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE WALMART SITES OR THE CONTENT, MATERIALS, PRODUCTS, SERVICES, FUNCTIONALITY, OR OTHER ITEMS INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU. TO THE FULLEST EXTENT PERMISSIBLE BY APPLICABLE LAW, THE WALMART ENTITIES DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. WITHOUT LIMITING THE FOREGOING, THE WALMART ENTITIES DISCLAIM ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, FOR ANY MERCHANDISE OFFERED. YOU ACKNOWLEDGE THAT, TO THE FULLEST EXTENT PROVIDED BY APPLICABLE LAW, YOUR USE OF THE WALMART SITES IS AT YOUR SOLE RISK. THIS SECTION 17 DOES NOT LIMIT THE TERMS OF ANY PRODUCT WARRANTY OFFERED BY THE MANUFACTURER OF AN ITEM THAT IS SOLD BY WALMART TO YOU. THIS DISCLAIMER CONSTITUTES AN ESSENTIAL PART OF THESE TERMS OF USE. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, YOU ASSUME FULL RESPONSIBILITY FOR YOUR USE OF THE WALMART SITES AND AGREE THAT ANY INFORMATION YOU SEND OR RECEIVE DURING YOUR USE OF THE WALMART SITES MAY NOT BE SECURE AND MAY BE INTERCEPTED OR OTHERWISE ACCESSED BY

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203 UNIF. COMPUT. INFO. TRANSACTIONS ACT § 406(b)(1)(A) (UNIF. L. COMM'N 2002) (describing methodology for disclaiming warranties under the Uniform Computer Information Transactions Act).

204 U.C.C. § 1-201(b)(10) (AM. L. INST. & UNIF. L. COMM'N 2021).

205 MICHAEL L. RUSTAD, SOFTWARE LICENSING: PRINCIPLES AND PRACTICAL STRATEGIES 222 (2010).

> UNAUTHORIZED PARTIES. YOU AGREE THAT, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, NO WALMART ENTITY IS RESPONSIBLE FOR ANY LOSS OR DAMAGE TO YOUR PROPERTY OR DATA THAT RESULTS FROM ANY MATERIALS YOU ACCESS OR DOWNLOAD FROM THE WALMART SITES. SOME STATES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE FOREGOING LIMITATIONS MAY NOT APPLY TO YOU.[206]

Table Eight: Readability of Warranty Disclaimer Clauses

Sample of Consumer Contracts	*FRE Score for Warranty Disclaimer Clauses*	*FKGL for Warranty Disclaimer Clauses*	*ToU as a Whole (N=100)*
One Hundred Largest Retailers	27 (N=82)	17	FRE score: 38 FKGL: Grade 14
One Hundred Largest Digital Companies	27 (N=81)	16	FRE score: 38 FKGL: Grade 14
One Hundred Largest Software Companies	27 (N=81)	17	FRE score: 38 FKGL: Grade 14
Fifty Largest Banks	22 (N=35)	21	FRE score: 42 FKGL: Grade 13

Table Eight above reveals that the vast majority of the largest retailers, digital companies, software companies, and banks disclaim all implied warranties in their ToU. Credit card companies typically do not include a warranty disclaimer clause, as they do not usually make warranties. Such clauses, like the liability limitation clauses, are drafted at a reading level that is two to seven grade levels above the consumer contract as a whole. The overall pattern is that while consumer contracts are unreadable, rights-foreclosure clauses are *indecipherable*.

As noted above, the largest U.S. companies are increasingly imposing predispute mandatory arbitration clauses, coupled with anti-class action clauses. U.S. consumers often "acquiesce to mandatory arbitration clauses, 'anti-class action waivers, damage caps, shortened statutes of limitations, "loser pays" rules, and choice-of-forum clauses that are buried thousands of words deep in poorly indexed boilerplate.'"[207]

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206 *Walmart.com Terms of Use*, *supra* note 140.

207 Thomas H. Koenig, *The Need to Reform Abusive Contracts for Internet Connected Toys*, 52 SUFFOLK U. L. REV. 187, 187–88 (2019) (quoting Koenig & Rustad, *supra* note 190, at 344).

These rights-foreclosure clauses are not only unreadable, but they also leave consumers with theoretical contractual rights and no meaningful remedies. These clauses are one-sided in depriving consumers of their rights but preserving the rights of the provider. An example of an asymmetrical provision is one that compels consumers to submit all claims against them to predispute mandatory arbitration but reserves the company's rights for its own court action to protect its intellectual property. American consumer law is predicated upon the untested assumption that informed consumers will make superior choices in the marketplace if providers offer them an opportunity to review terms and conditions prior to manifesting assent.[208] However, there can be a "meeting of the minds" even if the users do not have the reading skills to understand the contract or the clauses.

Rights foreclosure, which is derived through unreadable consumer contracts, is actually tort reform in disguise. Contract law cannibalizing tort rights is an example of the legal system becoming susceptible to the "boiling frog effect—the notion that a frog immersed in gradually heating water will fail to notice the creeping [temperature], even as it's literally being boiled alive."[209] The next Part of this Article contends that rights that are foreclosed through one-sided contract clauses are unenforceable in the twenty-seven countries of the EU.

Additionally, Part III proposes mandatory consumer provisions that invalidate predispute mandatory arbitration clauses, class action waivers, and complete disclaimers of warranty and liability. This proposed New Deal for Consumer Contracts would align U.S. law with our most important trading partner—the EU—and would give U.S. consumers the same strong mandatory rights enjoyed by EU citizens.

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208 "Courts generally will enforce contract terms as written. As the Texas Supreme Court recently pointed out, 'we do not protect parties "from the consequences of their own oversights and failures in nonobservance of obligations assumed."'" Sharon M. Beausoleil, *Contract Review—An Opportunity to Avoid Those Gotcha Moments*, NAT'L. L. REV. (Sept. 14, 2022) (quoting James Constr. Grp., LLC v. Westlake Chem. Corp., 650 S.W.3d 392, 403–04 (Tex. 2022)), https://www.natlawreview.com/article/contract-review-opportunity-to-avoid-those-gotcha-moments [https://perma.cc/D87S-EQF7].

209 Peter Dockrill, *Human Beings Are Susceptible to 'Boiling Frog' Phenomenon, Climate Scientists Warn*, SCIENCEALERT (Mar. 4, 2019), https://www.sciencealert.com/human-beings-are-susceptible-to-boiling-frog-phenomenon-climate-scientists-warn [https://perma.cc/PV9T-QF7D].

III. A PROPOSED NEW DEAL FOR CONSUMER CONTRACTS

This Part of the Article contends that rights that are foreclosed in the United States through one-sided contract clauses would be unenforceable in the twenty-seven countries of the EU. As such, this Part proposes reforms in U.S. ToU, summarized as the "New Deal for Consumer Contracts." The substantive part of this proposal would align U.S. consumer contract law with the EU provisions on unfair and deceptive contracts. These provisions are contained in the EU's Unfair Contract Terms Directive (UCTD), which protects consumers from one-sided terms by imposing a standard of readability that requires contract terms to be drafted in "plain and intelligible language."[210]

The European Economic Area (EEA), created in 1994, "combines the countries of the European Union (EU) and member countries of the European Free Trade Association (EFTA) to facilitate participation in the European Market trade and movement without having to apply to be one of the EU member countries."[211] The EEA countries include Iceland, Liechtenstein, and Norway, and their membership allows them to be part of the EU's single market.[212]

"The [UCTD] (93/13/EEC) protects consumers against unfair standard contract terms imposed by traders. It applies to all kinds of contracts on the purchase of goods and services, for instance online or off-line-purchases of consumer goods, gym subscriptions or contracts on

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210 The UCTD is summarized as follows:

> The Unfair Contract Terms Directive applies to business-to-consumer transactions. The UCTD protects consumers against the use by traders of standard (not individually negotiated) contract terms which, contrary to the requirement of good faith, create a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Unfair terms are not binding on the consumer. In addition, the Directive requires written contract terms to be drafted in plain and intelligible language. Contract terms whose meaning is unclear must be interpreted as favourably as possible for the consumer, and contract terms which are not transparent and do not allow consumers to understand their rights and obligations under the contract may be considered as unfair. The UCTD applies to both online and offline environments, and to all products, including digital content. It contains an indicative and non-exhaustive list of standard terms that may be considered as unfair.

CIVIC CONSULTING, EUR. COMM'N, STUDY FOR THE FITNESS CHECK OF EU CONSUMER AND MARKETING LAW: FINAL REPORT PART 1—MAIN REPORT 17 (2017), https://ec.europa.eu/newsroom/just/items/59332 [https://perma.cc/G7B7-ARQE] (discussing the UCTD (93/13/EE)).

211 Terri Mapes, *Countries in the European Economic Area*, THOUGHTCO. (Apr. 1, 2020), https://www.thoughtco.com/countries-that-are-eea-countries-1626682 [https://perma.cc/U8D6-VP6A].

212 *Id.*

financial services, such as loans."[213] The European Commission's 2019 amendments were enacted to improve enforcement and modernize the UCTD.[214] To aid in interpreting and applying the UCTD, the EU Commission adopted a Guidance Notice, stating:

> The main purpose of the Guidance Notice is to present the rich case law of the Court of Justice of the European Union on this Directive in a structured manner in order to facilitate effective application of the Directive in the EU and EEA Member States. It is addressed, in the first place, to legal practitioners and other actors involved in the defence of consumer rights. However, it may be beneficial also to businesses and consumer organisations and all those who are involved in the application of the rules on unfair contract terms.[215]

The European Commission's 2018 "'New Deal for Consumers' initiative aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernizing EU consumer protection rules in view of market developments."[216]

The substantive provisions of the EU's New Deal for Consumers will invalidate unfair and deceptive standard contract terms such as caps on damages, predispute arbitration, and the disclaimers of all meaningful warranties. Further, it will punish and deter companies from deploying unfair and deceptive contract terms by imposing penalties modeled on the 2019 Amendments to the UCTD.[217] The following Sections will explain the impact of these New Deal reforms on addressing indecipherable and unfair consumer contracts with the intention of harmonizing U.S. consumer law with the EU's mandatory consumer provisions.

A. *Imposing a Minimum Readability Rule*

As Parts I and II documented, neither courts nor statutes require that consumer contracts be readable. Thus, while consumers have a legal

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213 *Unfair Contract Terms Directive*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-contract-law/unfair-contract-terms-directive_en [https://perma.cc/2EAL-XSRV].

214 *Id.*

215 *Id.*

216 *Review of EU Consumer Law*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/consumer-protection-law/review-eu-consumer-law_en [https://perma.cc/R7MD-SGKU]. *See generally Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers*, COM (2018) 183 final (Apr. 11, 2018) [hereinafter *A New Deal for Consumers*], https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0183&from=EN [https://perma.cc/KF6S-SRYR].

217 Council Directive 2019/2161, arts. 8(b), 13, 2019 O.J. (L 328) 7 (EU).

duty to read contracts, companies have no equivalent duty to make their ToU readable. The United States' laissez faire approach to consumer contracts stands in sharp contrast to European consumer law, which protects consumers from one-sided contract terms. The twenty-seven countries of the EU require consumer contracts to be drafted in "plain [and] intelligible language" and state that "ambiguities are to be interpreted in favour of consumers."[218] Specifically, Article 5 of the UCTD states:

> In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).[219]

Article 6 of the UCTD makes unreadable and other unfair contract terms unenforceable:

> 1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.
>
> 2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.[220]

Like the UCTD, this Article's proposed procedural reform is to require that U.S. providers draft consumer contracts in "plain, intelligible language." However, one of the problems of adopting the UCTD standard is that the European Commission does not operationalize the "plain, intelligible language" readability standard by imposing a minimum reading level. Therefore, the proposed New Deal for Consumer Contracts highlights the importance of imposing specific readability standards to avoid disputes over whether text is "plain and intelligible."

The proposed New Deal for Consumer Contracts would deploy the FRE and the FKGL tests to assess whether specific consumer contracts are readable as opposed to the vague "plain, intelligible language" standard.[221]

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218 *Unfair Contract Terms Directive*, *supra* note 213.

219 Council Directive 93/13, art. 5, 1993 O.J. (L 95) 29 (EC).

220 *Id.* art. 6.

221 *See* Stockmeyer, *supra* note 28, at 46. *See generally NL 10605.105*, *supra* note 28.

Recall that the FRE scores text from 0 to 100, with 60 being the minimum for plain English.[222] Texts with scores between 0 and 40 are very difficult to read, while texts with scores of 80 and above are very easy to read.[223] The FKGL test is a "formula for computing a text's reading grade level."[224] The FKGL readability formula analyzes and rates text based on a U.S. grade school educational level. The proposed New Deal for Consumer Contracts would require consumer agreements to be drafted with an FRE score of at least 60 and an eighth-grade level or below; otherwise, they would be unenforceable. This would be determined by subjecting a given consumer contract or clause to analysis using the FRE and FKGL formulas.[225]

Under these proposed reforms, if consumer contracts do not meet these objective standards of readability, they would be unenforceable. The result of this reform would be to operationalize the EU's well-established "plain, intelligible language" standard using the best available measures of readability. U.S. companies would assess whether their consumer contracts comply—i.e., whether they are written at an eighth-grade level or below—before placing them on websites or otherwise introducing them to the consumer marketplace.

Another advantage of imposing a specific readability level is that U.S. companies would have, what is in effect, a readability safe harbor that protects them in the United States and Europe. Increasingly, U.S. companies are subject to European Commission enforcement. In 2021, for example, the Digital Marketing Act, "proposed by EU antitrust chief Margrethe Vestager last year, aim[ed] to curb the powers of Alphabet unit Google, Facebook, Apple and Amazon."[226] The plain language requirements of the New Deal for Consumer Contracts would give most U.S. users a reasonable opportunity to comprehend consumer agreements. Writing consumer contracts in easy-to-read language would bring common sense to the common law, as American adults have the right to understand what rights they are foreclosing when reading ToU and other consumer contracts.

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222 Stockmeyer, *supra* note 28, at 46.

223 *Id.*

224 *Id.*

225 *See NL 10605.105*, *supra* note 28.

226 *European Commission Would Police Big Tech Under New Rules Agreed by EU Members*, EURONEWS.NEXT (Sept. 11, 2021), https://www.euronews.com/next/2021/11/09/european-commission-would-police-big-tech-under-new-rules-agreed-by-eu-members [https://perma.cc/6NQN-E5JB].

B. *Invalidating Unfair and Deceptive Consumer Contract Terms*

1. Invalidating Caps on Damages

Apple, a two-trillion-dollar company,[227] states, "in no event will Apple be liable to you for any indirect, consequential, exemplary, incidental or punitive damages, including lost profits, even if Apple has been advised of the possibility of such damages."[228] Apple also caps its total damages, stating:

> [I]n no event [shall Apple's liability] exceed the greater of (1) the total of any subscription or similar fees with respect to any service or feature of or on the Site paid in the six months prior to the date of the initial claim made against Apple (but not including the purchase price for any Apple hardware or software products or any AppleCare or similar support program), or (2) US$100.00.[229]

Amazon, another trillion-dollar company, goes even further, capping damages at zero:

> AMAZON WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF ANY AMAZON SERVICE, OR FROM ANY INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) OR OTHER SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH ANY AMAZON SERVICE, INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, AND CONSEQUENTIAL DAMAGES, UNLESS OTHERWISE SPECIFIED IN WRITING.[230]

The largest U.S. companies impose limitations on liability that make it impractical for any consumer to file a claim against them. Amazon, for example, requires its users to waive their right to a jury trial and litigate in Amazon's choice of forum in the State of Washington.[231] The New Deal for Consumer Contracts would prohibit caps on damages, thus aligning

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227 Ben Popken, *Apple Is Now Worth $2 Trillion, Making It the Most Valuable Company in the World*, NBC News (Aug. 19, 2020, 11:03 AM), https://www.nbcnews.com/business/business-news/apple-now-worth-2-trillion-making-it-most-valuable-company-n1237287 [https://perma.cc/4BU8-TUJ3].

228 *Apple Website Terms of Use: Legal Information & Notices*, APPLE, https://www.apple.com/legal/internet-services/terms/site.html [https://perma.cc/R4PT-3KLX].

229 *Id.*

230 *Conditions of Use*, AMAZON (Sept. 14, 2022) , https://www.amazon.com/gp/help/customer/display.html/?nodeId=GLSBYFE9MGKKQXXM (last visited Oct. 8, 2022) (disclaimer of warranties and liability limitation clauses).

231 *Id.* (disputes clause).

U.S. consumer law with EU law.[232] The Annex to the UCTD specifically addresses limitations on legal liability of sellers or suppliers as follows:

> (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
>
> (b) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him[.][233]

As revealed in Part II, many leading U.S. companies cap damages at a nominal amount of $100 or less. Many of these companies also impose a predispute minimum arbitration clause. Moreover, consumer arbitrations of either the AAA or JAMS require consumers to pay $200 in order to arbitrate their claims.[234] Thus, under this proposed reform, consumers would not file arbitration claims where the total potential recovery is fifty percent of the cost to file an arbitration claim.

2. Prohibiting Predispute Arbitration & Class Action Waivers

Many leading U.S. companies, including Google, the world's largest search engine, require U.S. users to submit to binding arbitration.[235] Many of these arbitration clauses require the consumer to share the cost of hiring the arbitrator and other expenses in addition to the consumer remitting a filing fee.

Arbitration clauses, commonly used in U.S. consumer contracts, are unreadable, substantively unfair, and deceptively presented. Thus, the New Deal for Consumer Contracts would invalidate binding arbitration clauses in all consumer contracts, further aligning U.S. consumer law with the UCTD's invalidation of predispute mandatory arbitration clauses that exclude or hinder:

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232 *See* Council Directive 93/13, annex, 1993 O.J. (L 95) 29 (EC).

233 *Id.* at subdiv. 1(a)–(b).

234 AM. ARB. ASS'N, *supra* note 201, at 12 (imposing a $200 fee for consumer arbitrations).

235 *Google Arbitration Agreement—Devices, Related Accessories, and Related Subscription Services*, GOOGLE, https://support.google.com/store/answer/9427031?hl=en [https://perma.cc/2PZS-QGCH].

> the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.[236]

However, this reform would not prevent consumers from agreeing to arbitration after a dispute arises. Post-dispute arbitration agreements are significantly fairer than predispute arbitration in consumer contracts. Predispute arbitration agreements are seldom read or understood, whereas in post-dispute arbitration, consumers submit their claim to arbitration knowingly understanding the comparative advantages and disadvantages of arbitration versus a jury or court trial. The New Deal for Consumer Contracts would permit post-dispute arbitration agreements so long as the agreements are drafted at an eighth-grade level or lower. In addition, the consumer would have to agree to post-dispute arbitration in a signed online or paper-and-pen writing, voluntarily, and without coercion.

The New Deal for Consumer Contracts would also prohibit class action waivers, which prevent consumers from filing claims against U.S. companies where the dollar amount is small:

> Class action waivers have the practical effect of denying justice to [a] large number of consumers by divesting them of the right to pursue relief under state consumer law. Class actions, in effect, the keys to the courtroom since they enable consumers to curtail unfair and deceptive trade practices. Without class actions, vendors of goods and services may avoid judicial process and continue unfair practices with impunity. Immunity breeds irresponsibility in the information-age economy where an increasing number of companies are divesting consumers of any remedy by including class action waivers in their terms of service.[237]

Predispute arbitration clauses and their running partner, class action waiver clauses, systematically foreclose consumers' rights to a minimum adequate remedy—a problem that the New Deal for Consumer Contracts would eliminate.

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236 Council Directive 93/13, annex, at subdiv. 1(q), 1993 O.J. (L 95) 29 (EC).

237 Rustad & Onufrio, *supra* note 3, at 1174.

3. Invalidating Consumer Warranty Disclaimers

Part II revealed that top U.S. companies are routinely and systematically disclaiming all warranties, including a minimal merchantability standard, which claims that goods or services are fair, average, or fit for their ordinary purpose.

Invalidating caps on damages, predispute mandatory arbitration clauses, and consumer warranty disclaimers is an important first step in aligning U.S. consumer law with that of the EU. There is no deterring trillion-dollar companies when their total liability is capped at a nominal amount and they can shunt the case to a private arbitral forum, where they have all the advantages.

In 2019, the European Commission amended the UCTD to address penalties and dispute resolutions for unfair contract clauses.[238] These amendments, which took effect on May 28, 2022, introduced "an obligation for Member States to provide for effective penalties in case of infringements."[239]

Article 24 of these amendments requires Member States to enforce the UCTD with penalties that punish and deter:

> 1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.
>
> 2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:
>
> (a) the nature, gravity, scale and duration of the infringement;
>
> (b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
>
> (c) any previous infringements by the trader;
>
> (d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
>
> (e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;

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238 Council Directive 2019/2161, art. 4, 2019 O.J. (L 328) 7 (EU).

239 *Unfair Contract Terms Directive*, *supra* note 213.

> (f) any other aggravating or mitigating factors applicable to the circumstances of the case.
>
> 3. Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned.
>
> 4. For cases where a fine is to be imposed in accordance with paragraph 3, but information on the trader's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million.[240]

As with the U.S. remedy of punitive damages, Article 24 of the UCTD amendments will require EU penalties to be calibrated to the wealth of the defendant and the gravity of the offense.[241]

The New Deal for Consumer Contracts would protect consumers against unfair standard contract terms.[242] These rules would apply to all kinds of contracts for the purchase of goods and services, both online and offline. Moreover, they would not only ensure that U.S. contracts are readable, but they would also eliminate strategic use of rights-foreclosure clauses that leave consumers with theoretical rights divested of a minimum adequate remedy.

CONCLUSION

The duty to read is a fundamental principle of U.S. contract law, but merely making consumer contracts and foreclosure clauses readable is not enough. At present, U.S. contract law, which permits companies to limit all remedies and warranties, thus stripping consumers of any meaningful remedy, is out of step with Europe. The doctrine of freedom of contract in consumer transactions clashes with the UCTD and other mandatory consumer laws. Thus, the procedural justice prong of the New

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240 Council Directive 2019/2161, art. 4, 2019 O.J. (L 328) 7 (EU) (footnote omitted).

241 "For widespread infringements that affect consumers in several EU Member States, the available maximum fine will be 4% of the trader's annual turnover in each respective Member State. Member States are free to introduce higher maximum fines." Press Release, Eur. Comm'n, A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement (Apr. 11, 2018).

242 As previously stated, this initiative was "aimed at strengthening [the] enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernizing EU consumer protection rules in view of market developments." *Review of EU Consumer Law*, *supra* note 216. *See generally A New Deal for Consumers*, *supra* note 216.

Deal for Consumer Contracts would impose a nondisclaimable duty to draft readable consumer contracts, ensuring that the average American adult is able to understand them. Additionally, the second prong of the New Deal for Consumer Contracts would blacklist caps on damages, predispute mandatory arbitration clauses, and warranty disclaimers. The net effect of these reforms would be to bring common sense to the common law by bringing U.S. consumer law into alignment with the twenty-seven countries of the EU.