Regulating Forced Arbitration in Consumer Financial Services

Re-Opening the Courthouse Doors to Victimized Consumers

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Introduction

Whether they realize it or not, most Americans wake up every morning already subject to several, if not dozens, of forced arbitration clauses. We are likely to submit to those clauses when we use financial services like credit cards, bank accounts, and loans for education, housing, and automobiles. Increasingly, Americans must give up basic legal rights and remedies in order to access the financial services necessary for participation in today's economy. Indeed, contracts between businesses and individuals that contain these clauses have become so ubiquitous that they are nearly impossible to avoid.

The forced arbitration process harms consumers because it tends to be secretive, less independent of industry, more prone to erroneous and arbitrary rulings, more likely to discourage the pursuit of claims with procedural barriers, and more likely to provide inadequate relief for compensating victims of corporate wrongdoing.

In contrast to the civil justice system, the forced arbitration process disadvantages consumers because it tends to be secretive, less independent of industry, more prone to erroneous and arbitrary rulings, more likely to discourage the pursuit of claims with procedural barriers, and more likely to provide inadequate relief for compensating victims of corporate wrongdoing. Nevertheless, forced arbitration clauses have potentially serious consequences because the decisions made by individual arbitrators are binding and legally enforceable. Consumers typically are unaware of when and how forced arbitration clauses limit their rights. But those who try to enforce their legal rights through arbitration quickly learn that the process they are forced into is designed to protect the interests of businesses rather than deliver justice.

The situation of Captain Matthew Wolf, a member of the U.S. Army Reserve, illustrates the impact of this loss of legal rights. In 2007, Captain Wolf tried to exercise his rights under the Servicemembers Civil Relief Act and end his car lease early after he had been called up to serve in Afghanistan. Captain Wolf returned the car, but the dealership refused his request that it refund $400 he had paid toward future lease payments. When he tried to sue for the money in civil court, the automobile manufacturer invoked the forced arbitration agreement that was contained in the lease. After initiating the arbitration process, Captain Wolf was told that the total fees just for bringing the claim could be as much as $8,200, significantly more than what was at stake in the case.[1]

Such adverse results for ordinary citizens are not uncommon in arbitration, and they help to explain why the business community has broadly embraced the practice of including forced arbitration agreements into their contracts with unsuspecting employees and consumers. In fact, the forced arbitration movement can be seen as part of the business community's broader campaign to block citizen access to the courts.

For several decades now, corporate interests have waged this campaign against access to the courts by, among other things, pressing Congress to enact legislation that would preempt state tort law claims relating to a variety of consumer protection matters and lobbying state legislatures to adopt such so-called "tort reforms" as arbitrary caps on non-economic damages.[2] As with these other tactics, forced arbitration provides corporations with a powerful shield against liability for their harmful products or activities, since it denies citizens the opportunity to pursue their meritorious claims against them in federal or state civil courts. The end result is that businesses evade accountability, corporate wrongdoing goes unpunished, and the victims of that wrongdoing obtain no redress for the injuries they have suffered.

Such exclusion of ordinary citizens from basic legal protections violates fundamental principles of justice. Meaningful economic gain does not come from unequal power to get away with wrongdoing, but rather rests on general consumer confidence and respect for law, qualities that are difficult to quantify, but central to the public interest. The goal of making civil justice more efficient and affordable cannot be achieved by substituting a system designed to force a one-sided sacrifice of consumer rights.

The increased prevalence of forced arbitration clauses in consumer finance did not for the most part result from democratic policy or consumer preference. Instead, the Supreme Court has stretched the law to expand the power of business to impose these contract terms on ordinary citizens. Over the course of several cases stretching back to the 1980s, the Court has laid the legal foundation for this expansion by broadly interpreting key provisions of the Federal Arbitration Act of 1925, the federal law that legitimates private use of arbitration and provides for its judicial enforcement. At the time the law was enacted, the primary use for arbitration was to resolve disputes between two relatively sophisticated businesses that enjoyed roughly equal bargaining power. The Court's decisions, however, have sanctioned efforts by corporate interests to expand the use of arbitration well beyond this narrow context by making it easier for businesses to include forced arbitration clauses in contracts with individual consumers and employees, despite the obvious disparities in power and sophistication. Because the Court has upheld these clauses in the face of claims that they violate the contract law doctrine of unconscionability and the federal common law doctrine of effective vindication,[3] individuals that are subject to forced arbitration clauses have little recourse against their application.

The problematic use of forced arbitration clauses has become especially widespread in consumer contracts for various financial services and products. Consequently, in enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress directed the newly created Consumer Financial Protection Bureau (CFPB) to examine and potentially restrict the use of these clauses in the financial products and services it oversees.[4] Consistent with its legal authority, the CFPB completed and published a comprehensive study of forced arbitration clauses and their impacts on consumers in March 2015. Based on the findings from the study, the CFPB announced the outline of its proposal to regulate arbitration clauses on October 7, 2015. The outline describes in general terms the agency's intention to prohibit forced arbitration clauses that prevent consumers from participating in class action litigation in court. This proposal outline would still permit forced arbitration clauses that relate to individual claims, with the CFPB citing inconclusive evidence about the harms that consumers potentially face in bringing individual arbitration actions. The proposal outline explains that CFPB will continue to study individual arbitration.[5]

Since releasing the initial proposal outline, the CFPB has completed other important steps in the lengthy and complex rulemaking process, but much work remains to be done before it can issue its final rule. The agency has already conducted a small business review panel and is now set to publish its proposed rule for public review and comment. Following the public comment period, the CFPB will work toward revising its proposal in response to the public comments, and then publish a revised final rule. As a final step, the CFPB will have to defend its final rule on judicial review against the legal challenges that are likely to follow.

Given the long road ahead, the final rule that emerges could look a lot different from the proposal outline that the CFPB announced. On the one hand, the financial services industry will have several opportunities to attempt to push the CFPB to weaken the rule's protections for consumers. On the other hand, the CFPB could elect to adopt stronger restrictions on the use of forced arbitration for individual claims consistent with its continued investigation of this issue.

A strong rule regulating the use of forced arbitration will deliver significant public benefits that greatly outweigh any countervailing costs.

Based on the available evidence, the CFPB's initial decision to adopt a rule outlawing forced arbitration clauses that prevent class litigation accords with its statutory obligation under Dodd-Frank to protect consumers. Unfortunately, however, the agency risks failing to completely fulfill this obligation, given that it is also initially proposing to refrain from banning or otherwise placing consumer protection-oriented limits on the use of forced arbitration for individual claims, citing a lack of data to justify aggressive regulation for these types of forced arbitration claims. At the very least, the CFPB should consider regulating those aspects of individual arbitration that are clearly harmful to consumers, including excessive filing fees, prohibitive hearing location restrictions, harsh time limits for initiating claims, improper relief limits, and one-sided restrictions on choice of arbitrators. Each of these features of forced arbitration serves as a significant barrier to initiating and maintaining an individual claim, and, perhaps not incidentally, each likely contributes to the relative lack of data on individual claims that appears to be fueling the CFPB's overly cautious approach. As explored below, forced arbitration clauses aimed at preventing class and individual lawsuits unfairly burden consumers by denying them meaningful access to the civil justice system where they can seek to hold businesses accountable for wrongdoing and obtain justice for their injuries. Consequently, in addition to banning forced arbitration clauses that prohibit class action litigation, the CFPB should also take preliminary regulatory steps to eliminate some of the considerable obstacles preventing consumers from pursuing individual arbitration claims.

Unsurprisingly, the prospect of a CFPB rule restricting forced arbitration clauses has sparked a fierce backlash from the business community in general and the financial services industry in particular. They complain that arbitration offers a quicker, cheaper, fairer, and more predictable method for resolving customer disputes. They also contend that a rule banning forced arbitration will increase prices, limit credit availability, and harm their businesses' profitability. Below we examine each of these claims and explain why they are unpersuasive. Contrary to the financial industry's arguments, a strong rule regulating the use of forced arbitration will deliver significant public benefits that greatly outweigh any countervailing costs. Among its many benefits, this rule would ensure that citizens have access to a fair forum for resolving disputes with credit companies and other consumer financial institutions.

Dodd-Frank was enacted out of concern that catastrophic harm to the American public can result from predatory, non-transparent, and deceptive financial industry practices that nonetheless brought large short-term gains for some. Given the evidence that access to the courts provides superior public accountability, deterrence, and fair compensation, restrictions on forced arbitration for financial services consumers are a reasonable and appropriate means for promoting the compelling public interest in a stable, lawful, and trustworthy financial system.

CFPB Has a Legal Obligation to Issue a Strong Rule Limiting Forced Arbitration Clauses

As Congress instructed in Dodd-Frank, the CFPB must enact a rule banning or limiting the use of forced arbitration clauses if the agency determines that they are harmful to American consumers.[6] Congress directed the CFPB to make this determination by conducting a comprehensive study on forced arbitration agreements and their impacts on consumer wellbeing.[7] If, based on this study, the CFPB concluded that forced arbitration agreements harm consumers, then Dodd-Frank tasked the agency with regulating the practice "in the public interest and for the protection of consumers."[8]

In April 2012, the CFPB launched what would be a three-year-long study of forced arbitration clauses. This study represents the most comprehensive investigation of forced arbitration clauses and their effect on consumers ever produced. The CFPB began the process with the publication of a formal Request for Information. In response to this request, the CFPB received 60 sets of comments from a wide variety of interested stakeholders, ranging from public interest organizations to industry trade groups. The agency followed up on these comments by conducting a series of meetings with stakeholders to obtain additional feedback.[9] After publishing the preliminary draft of the study in December 2013,[10] the CFPB again met with stakeholders to obtain their comments on its design and findings. To gauge consumer understanding and awareness of forced arbitration clauses, the CFPB also conducted a nationwide telephone survey. [11] In March 2015, the CFPB published the final draft of the study.[12]

The CFPB's final study found that forced arbitration clauses appeared in contracts for consumer financial services at such astonishing rates as 53 percent of credit card contracts, 92 percent of prepaid credit cards, and 86 percent of private student loans.[13] These clauses prevent consumers from pursuing claims in court either individually or as part of a class action lawsuit, a form of legal action that permits the aggregation of many identical consumer claims, thereby making it feasible for consumers to sue even if their damages are small. Class action lawsuits are particularly important in the context of consumer financial services where companies are able to greatly enrich themselves by engaging in a broad pattern of wrongdoing that results in relatively small harms to individual consumers. Among the forced arbitration clauses that the CFPB studied, nearly 86 to 100 percent also contained clauses that prevented consumers from pursuing their arbitration claims as a class action as well, further limiting the effectiveness of arbitration as a means for obtaining justice.[14]

Despite the near ubiquity of forced arbitration clauses in many kinds of contracts, the CFPB nevertheless found that consumers rarely avail themselves of the arbitration process. Indeed, one of the most remarkable findings in the final study is that during the time period the CFPB examined, only 411 customer-only arbitration claims were made each year on average.[15] Given the millions of disputes that likely arose during that period, this number seems shockingly low. The situation seems even worse for smaller arbitration claims, with the CFPB finding that consumers brought only about 25 claims of $1,000 or less per year during the time period it investigated.[16]

The CFPB's final study also shines a spotlight on the lack of consumer awareness and understanding of forced arbitration agreements. Not only do consumers generally not know whether a contract contains a forced arbitration provision; the study found that consumers are not equipped to use the presence or absence of such a provision as a factor in deciding whether to sign a contract.[17]

The CFPB found that forced arbitration clauses appeared in 53 percent of credit card contracts, 86 percent of private student loans, and 92 percent of prepaid credit cards.

The CFPB found that the arbitration process tends to stack the deck in favor of financial institutions and against the interests of consumers. Consumers rarely prevailed in the past decisions studied by CFPB, winning only 20.3 percent of all cases involving affirmative claims for relief and only 13.8 percent of all cases involving disputed debt.[18] Further, the CFPB found no evidence to support the financial services industry's contention that forced arbitration resulted in lower prices and expanded access to credit for consumers.[19]

In the months after the CFPB's final study was released, a wide variety of stakeholders have cited its findings in calling for stronger restrictions on forced arbitration clauses. In May 2015, several members of Congress wrote to CFPB Director Richard Cordray asking him to fulfill his statutory obligation to regulate forced arbitration clauses.[20] Citing the "substantial bedrock of evidence" presented in the study, the lawmakers urge the CFPB to issue "strong rules" that would protect consumers. Several public interest groups, including a coalition of fair-lending-in-housing advocates and a coalition of consumer rights advocates, have also written to Director Cordray expressing their support for a strong forced arbitration agreement.[21]

In October 2015, the CFPB took its first step toward developing a forced arbitration rule when it released a pre-proposal outline as part of a small business review panel process. According to the outline, the CFPB will proceed in two steps. First, it is considering prohibiting forced arbitration clauses only insofar as they prevent consumers from participating in class action litigation. The CFPB concluded that maintaining consumers' access to class action litigation should be preserved, particularly given the data in its in final study showing that few individuals are able to effectively vindicate small value claims through arbitration.[22]

Second, as to arbitration clauses relating to individual claims, the CFPB concluded that they lacked sufficient data to justify a similar ban. For individual arbitration claims, the proposal outline describes the CFPB's plans to require the financial services industry to submit data on arbitration filings and outcomes, which the agency could publish on its website. The CFPB anticipates that such transparency measures would help to mitigate the potential for harm to consumers from arbitrations carried out by biased administrators or in an otherwise unfair manner .[23]

Congress made it clear that a strictly monetized industry-focused cost-benefit analysis does not apply. By law, CFPB must ensure that its forced arbitration rule is consistent with the "public interest."

As the rulemaking progresses, CFPB should resist calls from the financial services industry and its conservative allies in Congress to use a strict and industry-centered cost-benefit analysis to design the forthcoming rule regulating forced arbitration for several reasons. As a threshold matter, the Dodd-Frank legislation does not require that the forthcoming rule be formulated in this manner. Moreover, it is infeasible to produce a fully quantified estimate of costs and benefits.[24] This approach would require the agency to embark on the wasteful and ultimately quixotic task of attempting to identify the precise point at which regulatory benefits exceed regulatory costs. This would require fully quantifying and monetizing all of the social costs and benefits of a whole range of regulatory options and then, by calculating the point at which the marginal benefits curve intersects the marginal costs curve, identifying that level of regulation that is most economically efficient or "optimal."

Finally, not only is it infeasible to produce a fully quantified and monetized cost-benefit analysis for these kinds of public interest safeguards, the approach is fundamentally flawed in that it generates inherently skewed results that favor industry interests. Due to various methodological shortcomings, cost-benefit analysis systematically overestimates regulatory costs, while systematically underestimating regulatory benefits. Whereas the public interest requires consideration of benefits that defy easy quantification and monetization, the costs to industry are typically much easier to capture in dollars-and-cents terms. In addition, unlike a qualitative evaluation of the public interest, a cost-benefit analysis that centers on monetized costs tends to minimize or obscure the values and social goals that public interest regulations seek to advance. One reason for this is that some private costs to industry should reasonably count as public gains. In other words, when a business is no longer able to profit from cheating, confusion, and fraud, this should represent an overall societal benefit rather than a "cost" to business. Consider, for example, Bernie Madoff, who collected an estimated $64.8 billion by defrauding more than 10,000 people. Among the victims was a group of labor unions that lost several hundred million by investing part of their pension in Madoff's fraudulent hedge fund. They were able to recover nearly everything they lost when they settled a class action lawsuit against investment firms associated with Madoff's hedge fund for $219 million.[25] Similarly, a class action lawsuit against Bank of America settled in 2011 for $410 million to resolve claims that it cheated its customers by improperly charging them for overdraft fees related to their debit card purchases.[26] As a conceptual matter, the return of these ill-gotten gains to customers—and whatever costs Bank of America must incur to ensure that similar malfeasance does not occur again in the future—belongs on the benefits side of the ledger.

The practical effect of designing a regulation governing access to justice on the basis of a strict cost-benefit analysis is that it dilutes the safeguards of law, leaving the public inadequately protected against corporate wrongdoing. If the CFPB were to design the forced arbitration rule in this manner, it would violate Congress's clear mandate in Dodd-Frank that the rule put consumer protections ahead of industry profits.

In recent years, the business community has had some success in blocking other rules that were developed to implement Dodd-Frank and other statutes by convincing activist judges to read what amounts to a deceptively monetized cost-benefit analysis requirement into the relevant statutory provisions that authorized the rules. Perhaps the most notorious instance was the decision by the U.S. District Court of Appeals for the D.C. Circuit in *Business Roundtable v. SEC*, in which the court struck down the Securities and Exchange Commission's (SEC) "proxy access rule," a regulation that sought to promote greater shareholder democracy.[27] The court agreed with the plaintiff business trade associations that the SEC failed to properly assess the rule's costs. Though the agency attempted to calculate the rule's impacts upon "efficiency, competition, and capital formation," as required by law, the court determined that it had not done so to its exacting standards. Whether and how an agency could put an accurate or meaningful monetary value on concepts as nebulous as "efficiency, competition, and capital formation" is unclear. Needless to say, these and other similar decisions have had a chilling effect on the SEC and other agencies charged with ensuring Americans' financial security.[28]

The CFPB is not similarly constrained by this line of cases. Congress made it clear that a strictly monetized industry-focused cost-benefit analysis does not apply by directing the CFPB to ensure that its forced arbitration rule is consistent with the "public interest." The Supreme Court's recent opinion in *Michigan v. EPA* has confirmed that strict monetization is not necessary to an agency evaluation of whether a regulation meets this benchmark.

In the *Michigan* case, the Court examined whether a congressional command to the Environmental Protection Agency (EPA) to issue a rule only if it was “appropriate” required the agency to consider both costs and benefits. The Court reasoned that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good,”[29] and that this language simply required the EPA to undertake a basic consideration of costs as part of its regulatory decision-making. The Court distinguished this “soft” version of cost-benefit analysis from the kind that was at issue in *Business Roundtable* and other similar decisions. It explained that the EPA was not obliged to “conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value.”[30] It is likewise reasonable to interpret Dodd Frank’s public interest standard to require no more than a similar soft cost-benefit analysis requirement for the CFPB’s forced arbitration rule.

As explained in greater detail below, a robust rule limiting forced arbitration clauses would easily satisfy this more rigorous but less formal and non-quantified cost-benefit analysis test, since the large public benefits it would produce are more than sufficient to justify any countervailing costs.

Lack of Access to the Civil Justice System Unfairly Disadvantages Consumers

The key question the CFPB must answer as it continues development of its forced arbitration rule is whether the arbitration process offers consumers the same meaningful opportunity for obtaining justice that is available through the civil justice system. The CFPB's final study highlights several key differences between the civil justice system and arbitration, and, taken together, the study's findings suggest that these differences work to the disadvantage of consumers. In particular, the study highlights not only the significant barriers that individuals face in initiating an arbitration action, but also the various ways in which arbitrations' procedural rules are heavily stacked against consumers and in favor of the corporate party involved in the dispute. The study's empirical data provide further evidence that arbitration denies victims of corporate malfeasance a realistic shot at obtaining compensation for their injuries. These data confirm that few consumers avail themselves of the arbitration process, and fewer still prevail in their claims or recover more than a small percentage of the damages they are seeking. Consequently, the practical effect of forced arbitration agreements is to relegate consumers to an inferior forum for pursuing their legal rights where they might be denied a legitimate opportunity to hold to account the corporation that violated the law and to obtain just compensation for their injuries.

The practical effect of forced arbitration agreements is to relegate consumers to an inferior forum for pursuing their legal rights.

The CFPB took a conservative approach to interpreting some of the findings in its final study. Most notably, the agency claimed in its pre-proposal outline that the small number of arbitration claims available in its data set supplied evidence that was too inconclusive to justify a blanket ban on all forced arbitration clauses. In reality, of course, the small number of claims is likely evidence of systematic flaws of the arbitration process itself and the undue burdens that consumers face in pursuing arbitration claims. As the CFPB continues development of this rulemaking, it should resist using uncertainty as an excuse to do nothing, but rather pursue regulatory reforms that will make arbitration more accessible to consumers. Such reforms could address such barriers to initiating and maintaining individual arbitration claims as strict time limits for initiating claims, high filing fees, inconvenient hearing locations, improper limits on available relief, and biased arbitrators. While these measures would fall short of banning forced arbitration for individual claims, they might at least eliminate the most harmful features of forced arbitration for consumers so that it provides a better avenue for them to seek redress from the financial services industry for any injuries they might have suffered.

Forced Arbitration Clauses and Class Action Waivers Defeat Meaningful Access to Courts for Consumers of Financial Services

The civil justice system reinforces the efforts of regulatory programs aimed at preventing harm before it can occur.

Unfettered and meaningful citizen access to the courts has long played a critical role in effective functioning of the U.S. system of governance in general and in safeguarding the public in particular. The principle that ordinary citizens have enforceable legal rights is fundamental to democratic rule of law. By availing themselves of the civil justice system, victims of wrongdoing—particularly as it is perpetrated through corporate misbehavior—have access to a powerful avenue for seeking redress for the injuries they have suffered. Beyond this compensatory role, the civil justice system also reinforces the efforts of regulatory programs aimed at preventing such harms *before they can occur*. The threat of incurring civil liability adds a complementary deterrent factor that can discourage individuals and businesses from breaking the law and engaging in other kinds of harmful behavior.

The CFPB has found that civil litigation against the financial services industry, particularly in class actions, has achieved billions of dollars in compensation for ordinary citizens. Together, the 419 class action lawsuits studied by the CFPB reached settlements that called for nearly $2.7 billion in compensation, which included cash compensation of $2 billion and various forms of in-kind relief, such as the provision of free or discounted services, worth $644 million. Contrary to the claims of industry opponents of class action, the compensation from these settlements actually reaches the class members. Among the 251 settlements for which the CFPB had access to payment data, class members had received or were scheduled to receive a total of $1.1 billion in cash compensation or debt forbearance. Among the 236 settlements for which the CFPB had access to payment and class membership data, the agency further found that a total of 34 million class members had received or were scheduled to receive cash compensation.[31]

The increasingly widespread use of forced arbitration clauses, however, is depriving citizens of meaningful access to the courts, thereby undercutting the civil justice system. First, consumers cannot sue in court, depriving them of the right to form class actions in court. As just noted, class actions in court have been particularly effective in obtaining compensation for ordinary citizens. And, because forced arbitration clauses have become particularly common in the context of contracts for various kinds of financial services, consumers have little opportunity to avoid them. The CFPB found that over 50 percent of credit card contracts and 44 percent of checking account contracts contained these clauses. In contracts for prepaid cards, payday loans, private student loans, and third-party wireless service, the prevalence is even higher, ranging from 84 percent (payday loans) to as high as 92 percent (prepaid cards).[32] The CPFB found that the inclusion of forced arbitration clauses was far more common among the larger firms within a given industry, particularly in the consumer checking account, private student loan, and mobile wireless industries.[33]

Second, the forced arbitration clauses also prohibit citizens from banding together to pursue common joint claims in arbitration. Not only do such clauses prohibit consumers from pursuing class actions in the courts; they also cannot do so in arbitration. The CFPB found that the vast majority of forced arbitration clauses it examined—between 86 and 100 percent depending on the industry—contained class action waivers that prohibit consumers from joining together to pursue arbitration claims.[34]

The CFPB found that more than 54 percent of the individuals surveyed who were subject to forced arbitration clauses did not know if they could bring a lawsuit against their credit card issuer, and close to 40 percent incorrectly believed that they could.

Despite the relative ubiquity of forced arbitration clauses, few consumers are aware that many of the financial services contracts to which they are party, contain them, and most consumers do not understand their significance. In preparing its final study, the CFPB conducted extensive surveys of public awareness and understanding of forced arbitration clauses contained in credit card contracts. It found that more than 54 percent of the individuals surveyed who were subject to such clauses did not know if they could bring a lawsuit against their credit card issuer, and close to 40 percent incorrectly believed that they could. In contrast, only 7 percent of those surveyed recognized that the forced arbitration clause meant that they could not sue. This stark trend extends to consumer understanding about their rights to join a class action lawsuit against the credit card issuer, with 57 percent incorrectly stating that they could.[35] While a few financial services contracts offer consumers a limited opportunity to opt out of forced arbitration clauses, the CFPB found that most consumers it surveyed were unaware of this opportunity and thus were not able to take advantage of it.[36]

The wide lack of awareness is not surprising given that forced arbitration clauses are often buried in the fine print of lengthy adhesion contracts, which can contain several pages of dense legal jargon.[37] Many consumers don't even realize that they have entered into these contracts, since many businesses now treat such mundane acts as the use of a website or acceptance of a product as satisfying the requirement of voluntary consumer assent. Even if consumers become aware of and understand these clauses, they generally cannot negotiate over them, since all of the terms and conditions of the contracts are offered on a take-it-or-leave it basis. At best, their only alternative is to conduct the time-consuming and complex research necessary to find businesses that offer their services without forced arbitration clauses, which, as noted above, may be rare in many industries, such as prepaid cards or private student loans.

Due to pervasive misunderstanding, many consumers are caught completely off-guard when they attempt to avail themselves of the civil justice system to seek redress for harms they have suffered from credit card issuers and other financial services firms. This suggests that consumers are not providing informed consent prior to entering contracts that contain

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forced arbitration clauses. As a result, they are not able to express their preference in the marketplace for contracts that lack these clauses, nor are they able to bargain for lower process or better services in exchange for assenting to them. These vast information disparities between consumers and financial services industries regarding forced arbitration only reinforce the concern that consumers lack adequate bargaining power when entering into contracts that contain these clauses. They also call into question the fundamental appropriateness of the use of these clauses in complex consumer financial services contracts, especially given that arbitration was originally conceived as providing an alternative means of dispute resolution for two sophisticated businesses with relatively equal bargaining power.[38]

As citizen access to the courts continues to be systematically cut off by forced arbitration clauses, it will be increasingly important for government regulators to fulfill their role of holding corporations accountable by bringing public enforcement actions. The CFPB's data indicate that public enforcement actions alone may not be adequate to achieve justice for victims of abuses committed by the financial services industry. In particular, these data show that across cases of various sizes, private litigation has been far more successful in obtaining monetary relief for deserving plaintiffs as compared to public enforcement actions brought by government regulators. These disparate results were evident in cases involving only private litigation (*i.e.*, "private-only cases") as well as in those in which public enforcement action was brought by government regulators after private litigation regarding the claims had already been initiated (*i.e.*, "private-first cases"). For example, the CFPB found that in cases involving larger claims (*i.e.*, $10 million or more), settlements involving only private class actions or in which the private class action preceded the public enforcement action yielded almost $1.75 billion in relief for consumers. In contrast, settlements of large claims in which the public enforcement action preceded the private class action yielded only $299 million in consumer relief. For cases involving smaller claims (*i.e.,* less than $10 million), the same pattern held: private-only and private-first settlements generated relief of $6.8 million compared to just $180,000 in relief achieved in public enforcement-only and public enforcement-first cases.[39]

Several reasons might account for the relative lack of success in public enforcement actions. These include shrinking budgets and the threat of political attacks from industry and Congress that might force government regulators to approach enforcement actions more conservatively than is appropriate under the circumstances. Since these factors are likely to persist for the foreseeable future, it is reasonable to expect that public enforcement actions by government regulators will continue to fall short of what is needed to adequately hold corporations accountable for harming consumers. This further underscores the importance of ensuring citizens access to the courts where they will be empowered to seek justice on their own.

Finally, forced arbitration also prevents individuals from using civil litigation, and particularly class actions, to root out the worst industry-wide abuses by promoting needed consumer-oriented reforms. For example, judges in class actions or other civil suits can grant valuable remedies that go beyond simply compensating harmed plaintiffs, including issuing various kinds of injunctions and orders that require firms to abandon harmful practices or adopt ones that advance the interests of consumers.[40] By design, such reforms would increase consumer financial security and help avert future legal disputes. In contrast, arbitrators generally lack the authority to grant these kinds of relief.

Arbitration can involve large up-front fees and potentially risky fee-shifting arrangements that make pursuit of smaller claims prohibitively expensive.

Forced Arbitration Denies Consumers an Effective Tool for Holding Businesses Accountable and for Seeking Justice for the Harms They Have Suffered

The Barriers to Bringing an Arbitration Claim are Often Too High for Consumers

The CFPB's final study suggests that consumers are reluctant to use arbitration to resolve meritorious disputes with financial services companies, particularly when their claims involve relatively small claims. Overall, the agency found that only 411 customer-only arbitration claims were made each year on average.[41] The agency further found that consumers brought only about 25 claims of $1,000 or less per year, which represented approximately four percent of all of the arbitrations it examined.[42] In response, industry and its supporters might claim that financial services firms are able to successfully resolve most consumer industry complaints through internal dispute resolution processes without the need for resorting to arbitration.[43] Undoubtedly, many consumer complaints, particularly those involving relatively small amounts of money, are resolved in this fashion. Nevertheless, given that the class action lawsuits against the consumer financial services industry noted above involved millions of individual class members in total, it seems unlikely that successful resolution of consumer complaints through internal dispute resolution procedures can fully account for these remarkably low numbers. Instead, these data suggest that individual consumers are forgoing the opportunity to use arbitration as means for seeking redress for many of their injuries and that all too often financial services firms are not being held to account for their illegal and harmful behavior.

The relatively sparse use of arbitration, particularly for smaller claims, is not surprising given the significant obstacles that consumers might face in order to pursue a claim. Arbitration can involve large up-front fees and potentially risky fee-shifting arrangements that make pursuit of smaller claims prohibitively expensive.[44] To be sure, the initial filing fees can be low in many cases. For example, the two leadings arbitration organizations, the

American Arbitration Association (AAA) and JAMS, set initial filing fees at $200 and $250, respectively, which generally apply in most of their consumer arbitration actions.[45] Companies are free, however, to include provisions in forced arbitration clauses that call for the application of much higher initial filing fees. For example, in one case involving PayPal, the company stipulated that AAA's Commercial Arbitration Rules would apply (as opposed to those that apply to consumer-related disputes). As such, customers had to pay more than $2500 in arbitration fees, much more than the $125 cap that applied in AAA consumer cases at the time.[46]

In addition, while less common than in the past, some consumer contracts provide that arbitration hearings must take place in certain specified locations, which could require claimants to travel hundreds or thousands of miles at their own expense.[47] For example, some forced arbitration clauses have required customers to bring their claims in Arizona, California, or Delaware, regardless of where they happen to reside.[48]

Forced arbitration clauses can impose additional impediments for bringing claims, including relief limits and shortened statutes of limitations for initiating a claim. For example, the CFPB's final study found that the contracts for prepaid card, checking accounts, and mobile wireless services frequently included provisions that blocked consumers from obtaining punitive and consequential damages related to their claim.[49] The CFPB also found several examples of consumer contracts that included strict time limitations. For instance, the agency found that payday loan contracts with these provisions set an average time limit of less than 100 days after the claim first arose within which consumers would be required to initiate arbitration proceedings.[50]

Consumers would be in a better position to overcome many of these barriers to pursuing their claims in arbitration if they were able to do so as a class action. In this way, many of the large upfront costs of bringing an arbitration claim could be shared among the class members, which would make it more feasible to pursue smaller claims. But, as noted above, the vast majority of forced arbitration clauses in financial services contracts contain class action waiver provisions, which prohibit the use of class actions to pursue arbitration claims. These class action waivers thus create another impediment to the use of arbitration by consumers. As the dissenters in the Supreme Court case *AT&T v. Concepcion* noted, when individuals are barred from banding together to pursue their small claims collectively, consumers lose the incentive to pursue those claims at all.[51] Financial service providers can thus evade responsibility for perpetrating small but widespread wrongs against a large group of consumers who are never able to achieve compensation for their injuries. As such, the CFPB's announcement that it intends to institute a rule that would preserve a consumer's ability to pursue a class action is particularly significant, because it would eliminate a significant obstacle that prevents consumers from holding companies accountable for wrongful or illegal behavior.

At the same time, however, the myriad evidence demonstrating that consumers face substantial barriers to bringing an arbitration claim makes the CFPB's tentative decision to allow forced arbitration clauses that apply to individual claims all the more disappointing. As noted above, the agency cited the relatively few arbitration cases available in its data set as providing inclusive evidence that the use of forced arbitration for individual consumer claims was detrimental to the public interest. However, the most plausible explanation for the relatively few arbitration cases is that the barriers to bringing an arbitration claim are substantial enough to discourage most consumers from availing themselves of the process at all.

The CFPB should not merely limit itself to continued studies of individual forced arbitration. Rather, the agency should go even further and work toward a final rule that would eliminate the various kinds of barriers to initiating an individual arbitration claim, so that the arbitration process provides consumers with a fairer and more accessible venue for seeking compensation for their injuries and for holding the financial services more accountable for their harmful actions. At a minimum, the CFPB should work toward a final rule that addresses such anti-consumer features of arbitration as strict time limits for bringing claims, excessive filing fees, inconvenient hearing locations, and improper limits on available relief. These kinds of regulatory limits on individual forced arbitration would guarantee consumers a level of due process that is more akin to what must be provided in the civil justice system, and they would do so without undermining any of the purported benefits that the financial services industry claims that the arbitration process provides. As such, regulatory limits would clearly fall within the CFPB's statutory mandate under Dodd-Frank. Moreover, such limits would at least provide consumers with some level of due process protections while the CFPB continues to study the issue of individual forced arbitration. Indeed, the CFPB might even conclude on the basis of these studies that a blanket ban on forced arbitration clauses—including those that apply to individual litigation and class action litigation—is the only effective regulatory option to fulfill its statutory obligation under Dodd-Frank to protect consumers and advance the public interest.

Corporations typically enjoy a close relationship with the arbitrator that resolves their disputes, raising serious concerns about whether arbitration provides consumers with a neutral forum in which to pursue their claims.

The Arbitration Process is Stacked Against Consumers with Meritorious Claims

Consumers across the various industries CFPB analyzed prevailed in their claims far less frequently than the corporations they went up against. For example, the CFPB identified 158 arbitrations involving affirmative claims for relief brought by consumers for which it could determine the amount of the award. Of those, consumers prevailed only 20.3 percent of the time (32 cases), winning an average of only 12 cents for every dollar claimed over all.[52] The CFPB also identified 174 arbitrations involving disputed debts brought by consumers for which it had complete data. Of those, consumers prevailed only 13.8 percent of the time (24 cases), successfully disputing an average of only five cents of every dollar of debt that was at issue over all.[53] Small-value claimants achieved similarly poor results through forced arbitration. Of the 19 consumers who brought affirmative claims for less than $1000 filed in 2010 and 2011, only 4 (21 percent) received affirmative relief.[54] In contrast, when corporations brought affirmative claims or counterclaims to arbitration, they nearly always succeeded, prevailing about 93 percent of the time (227 cases out of a total of 244 for which the CFPB had data on the terms of the award). Over all, these companies won 91 cents for every dollar they claimed.[55]

Industry supporters of forced arbitration might argue that the low number of successful arbitration cases brought by consumers is simply a reflection of the fact that few of the cases involved meritorious claims. This explanation alone, however, cannot possibly account for the extremely low numbers in the CFPB's study. After all, it is highly unlikely that consumers brought only 56 meritorious claims (32 involving affirmative claims of relief and 24 involving disputed debt) to arbitration during the two-year period covered by the study's findings. This small number is especially striking when compared to the CFPB's data on successful class action litigation. As noted above, for example, the CFPB identified at least 236 successful class action settlements that involved a total of 34 million members. Given that tens of millions of individuals brought meritorious claims in civil litigation, it seems that more than a few dozen should have been able to do the same in arbitration.

Moreover, the skewed results are not surprising given that the procedural rules of arbitration are heavily stacked against the consumer and in favor of the corporation. As a threshold matter, corporations typically enjoy a close relationship with the arbitrator that resolves their disputes, raising serious concerns about whether arbitration provides consumers with a neutral forum in which to pursue their claims. In their forced arbitration clauses, businesses typically specify the arbitration organization that will hear any resulting disputes or in some cases will allow the customer to choose from a limited selection of arbitration organizations. Just a handful of arbitration organizations dominate this market. For example, the CFPB's final study found that AAA was the most commonly selected arbitration organization, appearing as the sole option in 48.5 percent of credit card contracts, 55.7 percent of checking account contracts, and 37.3 percent of prepaid card contracts. When taking into account forced arbitration clauses that provided consumers with a limited choice of arbitration organizations, AAA is nearly ubiquitous, appearing in 83.3 percent of credit card contracts, 91.8 percent of checking account contracts, and 94.1 percent of prepaid card contracts.[56] Other dominant arbitration organizations include JAMS and the National Arbitration Forum (NAF). The CFPB found very few contracts with forced arbitration clauses in which consumers had the option of choosing an arbitration organization other than these main three.[57]

A 2007 analysis found that the National Arbitration Forum's 10 most used individual arbitrators—who together presided over 60 percent of the cases heard—ruled in the consumer's favor only 1.6 percent of the time. By comparison, the least frequently used arbitrators (i.e., those involved in three or fewer cases) ruled in the consumer's favor 38 percent of the time.

The close relationships with their corporate clients create the appearance, if not the reality, of a problematic conflict of interests for arbitration organizations. Indeed, these organizations would appear to have a powerful economic incentive to deliver favorable results to the companies that select them in order to encourage repeat business in the future and maintain a steady revenue flow. Aware that a string of losses might induce a company to revise its consumer contracts to direct its arbitration business to competing arbitration organizations, individual arbitrators are likely to feel some degree of pressure to rule in favor of their corporate clients. A 2007 analysis by the *Christian Science Monitor* of individual arbitrations conducted by the NAF provides empirical support for this concern. The analysis found that the NAF's 10 most used individual arbitrators—who together presided over 60 percent of the cases heard—ruled in the consumer's favor only 1.6 percent of the time. By comparison, the least frequently used arbitrators (*i.e.*, those involved in three or fewer cases) ruled in the consumer's favor 38 percent of the time. Two former arbitrators for the NAF also told the *Christian Science Monitor* that bank clients declined to send them new cases after they had ruled against them in earlier arbitrations.[58] For its part, the civil justice system is largely able to avoid these kinds of problems by relying on well-established rules that require judges to recuse themselves from cases in which they face similar sorts of conflicts of interest and allow the parties to exclude jurors who might have conflicts of interest.[59]

The arbitration process is also skewed against the interests of consumers and the public because it is typically conducted in secret. In most cases, relevant information concerning the proceedings and results of individual arbitrations, as well as the existence of the arbitrations themselves, are shielded from public disclosure. The ethics code for arbitrators imposes a broad nondisclosure obligation on arbitrators. [60] Nevertheless, the CFPB found a few forced arbitration clauses that sought to reinforce or expand on these ethics rules by including separate confidentiality provisions.[61] Thanks to their status as repeat players, businesses will often already be aware of much of this information. Access to such important details as how past hearings were conducted and how past arbitrations were decided provide these businesses with a distinct advantage, enabling them to better prepare for any pending and future arbitrations. In contrast, the average consumer will almost never have the benefit of accumulated experience in the arbitration process.

Arbitration helps to protect businesses against the disclosure of misdeeds.

Arbitration's lack of transparency further harms the public by helping to protect businesses against the disclosure of misdeeds, which might tarnish their public image so that they lose customers and investors to competitors. Moreover, public disclosure of a business's misconduct can also benefit other firms in its industry by discouraging unlawful competition or even a "race to the bottom" scenario in which firms face increasingly strong economic incentives to undertake actions that are harmful to consumers. In effect, arbitration can enable businesses to gain a competitive advantage from unlawful activity, since it provides a mechanism for hiding those businesses' egregious conduct from other customers—even if a few of their former customers are able to obtain legal relief. This unlawful competition, in turn, can create economic pressure on other businesses to similarly skirt or violate the law.

Public information about corporate wrongdoing is important not only for efficient market competition, but also for effective democratic government. By identifying patterns of unlawful activity or consumer harm, citizens and political leaders can more effectively and accurately evaluate current law enforcement and better design social and legal reforms. For example, a 1998 lawsuit brought by Lilly Ledbetter against her employer Goodyear Tire and Rubber Company helped focus the public's attention on the broad social problem of gender-based pay discrimination for female workers. While ultimately unsuccessful, the suit led to long-overdue legal reforms that make it easier for female employees to bring equal-pay lawsuits under the Civil Rights Act of 1964.[62]

Another way that arbitration's secrecy takes away valuable public information is by providing consumers with little opportunity for conducting discovery.[63] In the civil justice system, discovery serves the critical function of revealing previously hidden information about the potential harms that a company's products or business products might pose to consumers or its workers. For example, residents near DuPont's Parkersburg, West Virginia, chemical plant brought suit against the company in 2001, seeking compensation and to force it to clean up their local water supplies, which it had been polluting for several years. During the discovery process, the plaintiffs and their attorney obtained documentary evidence that one of the chemicals that was in their water supply, PFOA, was much more dangerous than DuPont had previously disclosed. In particular, these documents revealed that the company had known for at least two decades that PFOA posed a significant health hazard to humans and had been linked to developmental birth defects, liver disease, and prostate cancer.[64] Unsurprisingly, businesses are anxious to keep this kind of information secret and would not otherwise disclose it in the absence of judicially-enforced discovery procedures.

Beyond the lack of transparency, arbitration also differs from the civil justice system in that it offers few procedural safeguards to ensure that consumers receive a meaningful opportunity to state their case for relief. Arbitrators are generally not required to have any legal training or expertise.[65] In making their decisions, arbitrators are not required to follow precedent or any applicable law, and they do not have to provide parties with clear reasons for their decision.[66] The lack of such procedures increases the likelihood that arbitrator's decisions will be arbitrary or otherwise based on improper considerations. Nevertheless, these decisions are binding on the consumer, and could subject them to tens of thousands of dollars in fees and penalties.

Among the two years' worth of consumer claims the CFPB studied, it could only identify four instances of arbitration appeals.

When consumers receive adverse determinations, they rarely have the opportunity to appeal them on the merits to either a civil court or an arbitration appeals panel.[67] In fact, AAA, the largest arbitration organization, does not have an established appeals process for consumer claims; instead, any appeals process must be specifically provided for in the relevant forced arbitration clause. Among the two years' worth of consumer claims the CFPB studied, it could only identify four instances of arbitration appeals.[68] Without a robust appeals process, arbitration lacks a crucial accountability mechanism for policing arbitrators' decisions to ensure consistency and fairness. Consequently, arbitrators will be more likely to resolve disputes by issuing improper or incorrect decisions.

As indicated above, the basic default rules that govern the arbitration process are set by the presiding arbitration organization itself. Given that arbitration is a completely private institution, however, parties to a contract that contain a forced arbitration clause are free to negotiate the addition or removal of procedures as they see fit. In the context of consumer contracts, of course, it is always the corporation that takes advantage of this power, and not surprisingly does so to advance its own interests. These rule changes may not be clearly disclosed to consumers in advance, and may themselves be altered or abandoned in the middle of an arbitration proceeding without notice to the consumer.[69]

As it works toward a final rule, the CFPB should likewise consider adopting restrictions aimed at eliminating some of the biased procedures that prevent consumers from successfully pursuing their meritorious claims. The agency's pre-proposal outline would take a step in this direction by introducing new transparency measures about the kinds of claims that are brought and their eventual resolution. The CFPB should build on this effort by prohibiting the financial services firms from including one-sided restrictions on selecting an arbitrator in their forced arbitration agreements.

The Financial Services Industry's Arguments in Favor of Forced Arbitration are Exaggerated or Lack Credibility

Without a hint of irony, the financial services industry contends that arbitration is a boon for the public—one, evidently, that must be imposed upon unsuspecting customers for their own good through the use of forced arbitration clauses buried deep in lengthy adhesion contracts. In an effort to deflect attention from how arbitration effectively insulates them from accountability for harming consumers and breaking the law, banks and financial institutions have attempted to argue that arbitration offers the public several relative advantages over the use of the civil justice system to vindicate their rights, including the time, cost, and fairness involved. They further offer the standard antiregulatory arguments that imposing limits or conditions on the use of forced arbitration will lead to higher prices for consumers and increased unemployment. Opponents of the CFPB's upcoming regulation of forced arbitration clauses are likely to voice these same arguments during the rulemaking process. As discussed below, each of these arguments lacks merit.

One arbitration organization, JAMS, may charge consumers up to $1200 for a "case management fee" in addition to arbitrator fees, which have no cap and are set on a case-by-case basis.

Arbitration Does Not Provide Victims of Financial Harm with a Superior Vehicle for Obtaining Justice

Pointing to the initial filing fees involved, the financial services industry contends that arbitration is less expensive for consumers than litigation. A simple comparison of these fees, however, offers no clear support for this contention. As the CFPB's final study on arbitration points out, it costs $400 to file a suit in federal court, while initiating a case in a typical municipal small claims court will run only as a high as $112.[70] In comparison, as noted above, the filing fees that AAA and JAMS charge both fall within this range at $200 and $250, respectively.

The industry argument also ignores that businesses are free to draft their forced arbitration clauses to require initial filing fees that would be several times greater than what it costs even to initiate a federal suit. For example, under a different set of its rules, JAMS may charge consumers up to $1200 for a "case management fee" in addition to arbitrator fees, which have no cap and are set on a case-by-case basis.[71] Likewise, companies could follow the lead of PayPal and specify that AAA's Commercial Arbitration Rules apply, which would significantly increase the initial filing fees to more than $2500 since without regulation there is no prohibition on this behavior.

In many cases, those wishing to bring an arbitration action often must bear several other expenses beyond just the initial filing fees. As noted above, some companies stipulate that arbitration proceedings must take place in a certain location that, while convenient for the corporation, might require consumers to travel thousands of miles at great personal expense.

Of course, when bringing a civil suit, plaintiffs frequently must retain an attorney and incur other forms of litigation costs, such as obtaining evidence to substantiate their claim. Indeed, according to industry supporters of arbitration, attorneys' fees, which they regard as excessive, are one of the reasons that litigation, and particularly class action lawsuits, are too expensive. Contrary to this claim, the CFPB's final study found that the average attorneys' fees in the class actions it examined amounted to just 21 percent of the cash compensation obtained, or just 16 percent of total gross relief, which also includes various forms of in-kind relief.[72] Conservative critics of the CFPB's final study point out that the amount of attorneys' fees as a percentage of relief obtained varied depending on the type of case involved, suggesting that the fees were excessive in at least some of the cases.[73] This argument ignores, however, that variations in attorneys' fees are not unusual, given that they are set on a case-by-case basis to reflect the technical difficulty of the case, the total number of hours worked, and other such relevant factors. The fact that the presiding judge must approve attorneys' fees provides further support that the varying attorneys' fee rates were appropriate in light of the particular circumstances of each case.

These types of expenses do little to distinguish the civil justice system, however, since the use of legal representation for consumers and complex substantiating evidence is becoming increasingly common in the arbitration process as well. As the CFPB's final study observes, customers retained attorneys in 63 percent of the arbitration filings it examined.[74] Moreover, the costs of obtaining necessary substantiating evidence for arbitrations can be quite high as the 2013 Supreme Court case *American Express, Co. v. Italian Colors Restaurant* dramatically demonstrates. There, the plaintiff small businesses sought to form a class action in part to share the costs of retaining economist consultants to conduct a complex analysis to support their claim that American Express was charging certain credit card fees in violation of federal antitrust law. The plaintiffs estimated that this analysis would cost at least several hundred thousand dollars to produce.[75] The Court ultimately held that the plaintiffs were subject to a forced arbitration clause, which included a class action waiver, and thus were precluded from forming a class to sue. The majority reached this decision, even though they recognized the costs of obtaining the critical evidence far exceeded the maximum compensation of $38,549 available to each plaintiff and that preventing the plaintiffs from sharing this cost would thus deny them the opportunity to effectively vindicate their rights.[76]

Class action suits achieve significant judicial economy by resolving the common injuries suffered by a large group of similarly situated victims all at once, rather than incurring the unnecessary expense and duplication of numerous individual civil actions.

The financial services industry similarly argues that the arbitration process delivers results faster for consumers as compared to litigation, and, at first blush, the CFPB's final study does appear to offer some evidence to support this claim. It found that the median length of time to resolve an arbitration involving in-person hearings was seven months.[77] In comparison, the study found that the median duration required to obtain resolution of multi-district litigation class action lawsuits or court approval class action settlements was about two years each.[78]

These numbers should be interpreted with caution, however. For one thing, the defendant corporation in these kinds of class actions is often the party responsible for dragging out the litigation, by filing frivolous motions designed to delay proceedings by resisting or flouting required disclosures during the discovery process, and by other time consuming strategies.[79] These maneuvers are particularly effective at creating delay when they defeat the very litigation procedures that are meant to expedite proceedings, such as dispositive summary judgment motions. For another thing, the significantly better results that customers achieve through the litigation process are often worth additional time that must be expended. After all, the relatively short timeline for resolving arbitration claims means little to those victims of corporate malfeasance who do not have a fair chance to pursue a meritorious claim in the first place.

A simple comparison of the length of time to resolve particular cases also overlooks the significant efficiency benefits that litigation, and particularly class actions, offers in the arena of consumer financial protection. As noted above, class action suits achieve significant judicial economy by resolving the common injuries suffered by a large group of similarly situated victims all at once, rather than incurring the unnecessary expense and duplication of numerous individual civil actions. In the absence of class action litigation, many victims of corporate wrongdoing have no option available for achieving justice. Moreover, private litigation complements, rather than duplicates, government enforcement actions to protect consumers. The CFPB's final study found little overlap between private litigation and government enforcement actions, and that when such overlap did exist, it was usually the private litigation that preceded the government enforcement action.[80]

Finally, proponents of forced arbitration argue that it delivers fairer and more predictable results than the civil justice system. In a July 2015 letter to the CFPB, for example, attorneys for several financial industry trade groups including the American Bankers Association (ABA) and the Financial Services Roundtable resorted to cherry-picked data from the CFPB's final study and misleading comparisons to make the argument that consumers achieve better results through arbitration. They began by noting that the CFPB's final study found that consumers who brought successful arbitration claims recovered on average $5,389, for an average of 57 cents for every dollar claimed.[81] This finding, however, was based on only a small subset of the arbitration awards data that the CFPB examined. Taking into account the excluded data, the CFPB actually found that consumers recovered just 12 cents for every dollar claimed in the arbitrations it examined, as noted above.[82] Relying on different CFPB data, the banking industry letter goes on to calculate that members of successful class action suits only recovered $32.35 on average.[83] Notably, though, these calculations are based on less than 60 percent of the settlements that the CFPB examined for the study and for which it had some data regarding settlement rewards.[84] The attempt to draw a firm conclusion about what the average recovery was for class action members on the basis of these incomplete data is likely to be inaccurate and therefore misleading.

Even if the banking industry letter had relied on more accurate data, its comparison between individual arbitrations and class action suits is inapt. As noted above, individuals wishing to pursue arbitration claims face significant obstacles, which ultimately discourage them from pursuing such claims except in those cases in which the stakes are relatively high. The CFPB's final study confirms that very few forced arbitration claims are made when the remedy sought is small, finding that fewer than three percent of the arbitration actions it examined—roughly only 25 per year—involved claims for less than a $1000. In contrast, the CFPB found that the average arbitration claim amount involved around $27,000.[85] More to the point, this comparison ignores the fact that one of the primary reasons that the class action exists as a legal tool is to enable large groups of people to efficiently pursue redress for relatively small injuries. By comparing the results of successful class action litigation to a few successful individual arbitration claims, all of which tend to involve higher stakes, the banking industry letter creates the false impression that arbitrations are more advantageous for all consumer complaints.

Industry claims about the fairness of arbitration also overlook the large number of deserving victims who are ultimately unable to pursue their claim to a successful conclusion. In many cases, the barriers to bringing a claim discourage many from availing themselves of the arbitration process in the first place. And, as noted above, those who do initiate arbitration claims rarely prevail. In short, even were it true that arbitration provides significant relief to a handful of lucky individuals, this hardly makes up for the fact that many times more deserving claimants will receive no compensation at all.

For all its imperfections, the civil justice system still offers all victims of corporate wrongdoing a much better shot at fully vindicating their rights than arbitration.

Related to its claims about fairness, the financial services industry also argues that arbitration yields more predictable results than does the civil justice system. In particular, this contention primarily targets the role of juries in the civil justice system, which, according to proponents of arbitration, introduces needless unpredictability. [86] Juries play a vital role in our democracy,[87] and the push to further entrench forced arbitration can be seen as a direct attack on the continued existence of civil juries as an institution.

The arbitration process is far more likely to yield arbitrary outcomes than a civil justice system that relies on juries.

More broadly, though, the claim that arbitration offers significant predictability fails upon closer examination. As noted above, arbitration proceedings are typically kept secret, and arbitrators are not required to explain the basis for their decisions to the parties. As a result, no body of precedent is built up over time to guide the decisions of arbitrators in future cases that involve similar fact patterns or raise analogous issues. Even if required, most arbitrators would probably lack the skills necessary to properly establish and follow precedent, since they are generally not required to have any specialized legal training. Moreover, whereas the judiciary has a robust appellate system that helps promote clarity and consistency by supervising the application of precedent, no similar mechanisms exists in arbitration, since the option to appeal an adverse decision is rarely available to arbitration participants. Given this general lack of institutions and mechanisms for promoting consistency and predictability, the arbitration process is therefore far more likely to yield arbitrary outcomes than a civil justice system that relies on juries.

Imposing Reasonable Limits on Forced Arbitration Will Not Increase Prices for Consumers or Cause Unemployment

The prospect of the CFPB exercising its statutory authority to place limits on the use of forced arbitration clauses has provoked the now familiar response from the financial services industry that any such restrictions on their operations would increase their prices for customers and lead to significant job loss. The CFPB's final study, however, refutes this claim.

Critically, the agency was able to test industry's contention that forced arbitration results in lower prices and expanded access to credit for customers by examining how four large credit card companies responded to a 2009 class action settlement in which they agreed to refrain from incorporating forced arbitration clauses into their consumer contracts for a period of at least three-and-half-years.[88] The CFPB found that the affected credit card companies did not raise their prices relative to their competitors that continued employing forced arbitration clauses.[89] The CFPB also found no evidence suggesting that the affected credit card companies reduced the amount of credit they made available to potential customers, although the results were less conclusive based on the limited data available.[90]

To be sure, the CFPB was unable to ascertain whether forced arbitration actually lowers costs for the financial services industry, as its supporters contend. The results described above do indicate, however, that whatever costs savings the financial services industry might enjoy from forced arbitration are not being passed on to consumers in any meaningful fashion. This result should not come as a surprise, since, as noted above, the vast majority of consumers are unaware that their contracts with the financial services industry contain forced arbitration clauses and are thus generally not able to demand lower prices or expanded credit in exchange for accepting them. In the context of financial services, at least, the industry's "trickle down" theory in support of forced arbitration appears to have no foundation in actual practice.

A related criticism often levied by opponents of regulation is that the increased costs they impose on an industry leads to greater unemployment. Despite its intuitive appeal, the claim lacks any theoretical or evidentiary basis. After all, the steps a business undertakes to comply with or respond to a new regulation is simply a form of spending, and as such generates tangible economic activity. In turn, this spending generates job gains that can offset whatever job losses a firm might experience as a result of a regulation. The relevant question, then, is what net impact a given regulation has on employment overall.

While difficult to measure, most existing studies find that regulations result in either no overall impact or even an actual increase in employment in some cases.[91] For example, a study of Bureau of Labor Statistics (BLS) data by the Environmental Policy Institute (EPI) found little evidence that jobs are lost due to regulation.[92] Until recently, the BLS had developed an "extended mass layoff" data series, which examined the reasons why companies lay off 50 or more workers for more than 30 days. Significantly, the data series were based on employer-supplied information. EPI found that an average of only 0.3 percent of workers lost their jobs because of government regulations or interventions during the years 2007 through 2009. This result is similar to data concerning layoffs prior to 2007.[93] (By comparison, the same data find that extreme weather events have caused more extended mass layoffs.[94]) Similarly, regulatory scholars at the University of Pennsylvania conducted a comprehensive book-length study that looked at the economy-wide employment impacts of regulation and concluded that "to date the empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States."[95]

Most importantly, this line of argument overlooks the fact that inadequate regulation of the financial services industry can result in catastrophic job

A CFPB regulation that establishes reasonable limits on forced arbitration could help to prevent future instances of catastrophic job loss by contributing to greater stability in the financial services industry and helping to avert financial crises.

losses, as the recent global economic crisis dramatically demonstrated. The 2008 financial collapse and resulting Great Recession in the United States was in large part precipitated by the steady deregulation of the financial services industry over the course of several decades. According to a 2013 Government Accountability Office analysis, the economic crisis could cost the United States more than $13 trillion in lost economic output over all. [96] Most estimates put the total job losses that resulted from the financial crisis at 8.7 million.[97] Thus, by contributing to greater stability in the financial services industry and helping to avert similar financial crises, a CFPB regulation that establishes reasonable limits on forced arbitration could help to prevent future instances of catastrophic job loss. These benefits would in turn far outweigh the limited direct job losses, if any, the rule might cause.

Even if the CFPB's rule does reduce the profits of the financial services industry, much of this impact would not constitute a "cost" in any event. As noted above, the impacts these firms would experience would come in the form of foregone profits obtained unjustly through fraud or other illegal means as well as compliance costs aimed at preventing such illegal or fraudulent behavior in the first place. As a matter of simple economics and fairness, these impacts should rightly be categorized as social benefits to be promoted, rather than costs to be avoided. After all, much of the costs that financial services firms will experience under this rule would not disappear in the rule's absence. Instead, they would continue to be borne by consumers in terms of stolen wealth and economic insecurity.

Importantly, the CFPB's own study further indicates that any impacts that its rule would have would be particularly minimal on those small firms in the financial services industry. The CFPB found that forced arbitration clauses were less common in consumer contracts issued by the small- and mid-sized firms it studied, including contracts for consumer credit cards (75.0 percent of large firms versus 42.1 percent of small- and mid-sized firms) and checking accounts (45.6 percent versus 7.1 percent).[98] Moreover, when small- and mid-sized firms do include forced arbitration clauses in their consumer contracts, these clauses were less likely to include key anti-consumer features. In particular, the CFPB found that the smallest firms it studied were less likely to prohibit consumers from pursuing arbitration claims collectively as a class action.[99] Consequently, any restrictions that the CFPB's final rule places on the use of forced arbitration clauses would impose little costs on many of the smaller firms covered by the rule, since it would have little or no impact on their existing business practices.

Conclusion

Now that the CFPB has determined that regulation of forced arbitration clauses is warranted under Dodd-Frank, the agency should work quickly to complete development of a strong rule with robust safeguards for consumers that limits the abusive use of these clauses by the financial services industry. The findings of the comprehensive final study that the CFPB published in March 2015 provide ample evidence supporting this determination, consistent with its legal authority under Dodd-Frank. The study leaves little doubt that strict regulation of forced arbitration clauses would be “in the public interest” and would contribute to the “protection of consumers.” In particular, the final study includes the following key findings:

- Consumers are largely unaware and do not understand the significance of the forced arbitration clauses to which they are subject;
- Forced arbitration clauses are highly prevalent in a wide variety of consumer contracts for financial services;
- Consumers rarely avail themselves of the arbitration process, particularly for smaller claims;
- As compared to the civil justice system, the structure and process of pursuing an arbitration claim differs in significant ways, all of which are biased against providing consumers with a fair and realistic chance of prevailing;
- The rate of successful consumer arbitration claims is several times lower than the rate of successful arbitration claims made by corporations against consumers;
- When consumers do prevail in arbitration, the relief they obtained was quite limited, particularly when compared to the relief that corporations obtained when they prevailed in arbitration; and
- The available evidence contradicts the financial service industry’s claim that limits on forced arbitration clauses will lead to increased prices and restricted access to credit for consumers.

These findings convinced the CFPB to consider a regulation that bans forced arbitration clauses that prohibit consumers from joining a class action in court. However, it appears the initial proposal outline that the CFPB announced in October 2015 does not go as far as it should to protect the victims of corporate malfeasance, since it would still permit forced arbitration clauses that force consumers to pursue their individual claims through the arbitration process. The CFPB based this initial decision to leave forced arbitration for individual claims unregulated on the limited data available in its study. However, even these limited data tend to support the conclusion that forced arbitration for individual claims makes consumers worse off. In particular, these data suggest that the reason there are so few individual arbitration claims is that the barriers to bringing them are unduly burdensome, leaving consumers no viable method for vindicating their rights either in arbitration or in court.

As it undertakes the remaining steps of the rulemaking process, the CFPB should at the very least consider revising its rule to address specific harmful anti-consumer features of the arbitration process that discourage and even prevent consumers from initiating and maintaining their individual arbitration claims. In particular, the CFPB should place restrictions on excessive filing fees, prohibit locating the arbitration hearings in inconvenient locations, ban unduly short statutes of limitations, and prohibit improper limitations on available relief. These restrictions would help to eliminate some of the greatest barriers that prevent individuals from successfully pursuing meritorious individual claims. The CFPB should also consider taking steps to ensure that the arbitration process, once initiated, is not unfairly stacked against consumers. The agency's plan to make arbitration cases and results more transparent will go a long way toward addressing this issue. The CFPB should build on this effort by also prohibiting financial services firms from giving themselves nearly total control over the selection of arbitrators to hear consumer claims.

Based on the evidence contained in the agency's final study on forced arbitration clauses, the CFPB appears to have a strong obligation under Dodd-Frank to take decisive action to address the use of forced arbitration clauses that restrict both individual and class action lawsuits. Consistent with the CFPB's statutory mandate, a rule that preserves consumer access to the civil justice system individually and collectively would undeniably protect consumers and advance the public interest. Such a rule would ensure that consumers always have access to a forum in which they have a fair and realistic opportunity to pursue their meritorious claims. As the CFPB's final study indicates, arbitration fails to provide such a forum for both individual and class action claims. As a result, forced arbitration denies victims of corporate wrongdoing a viable avenue for seeking justice. In addition, it would also enable the civil justice system to fulfill its unique role of complementing and reinforcing the various Dodd-Frank regulatory programs that are aimed at safeguarding consumer financial security. In particular, the rule would ensure that the threat of tort liability is effectively brought to bear on the financial services industry so that firms would be deterred from defrauding their customers or undertaking other kinds of activities that place their customers' financial health at unacceptable risk. This deterrent effect would thus help federal regulators to achieve Dodd-Frank's goal of preventing the financial services industry from taking advantage of American families and small businesses and causing them economic harm. In fact, a robust civil justice system could even help prevent the kinds of widespread abuses that precipitated the 2008 Wall Street financial crisis, which cost the U.S. economy trillions of dollars and millions of jobs. In light of these important benefits, it is clear that the modest costs that might be imposed on the financial services industry by a strong rule to prohibit forced arbitration clauses that prevent consumers from bringing individual and class action litigation would be more than justified.

Endnotes

[1] Michael Corkey & Jessica Silver-Greenberg, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES, March 16, 2015, *available at* http://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html.
[2] *See, e.g.*, William Buzbee et al., "*Fifty FDAs": An Argument for Federal Preemption of State Tort Law That is Less Than Meets the Eye* (Ctr. for Progressive Reform, White Paper 911, 2009), *available at* http://www.progressivereform.org/articles/50FDAs911.pdf; William Buzbee et al., *The Truth about Torts: Rethinking Regulatory Preemption and its Impact on Public Health* (Ctr. for Progressive Reform, White Paper 901, 2009), *available at* http://www.progressivereform.org/articles/RethinkingPreemption902.pdf; William Funk et al., *The Truth about Torts: Regulatory Preemption at the Consumer Product Safety Commission* (Ctr. for Progressive Reform, White Paper 807, 2008), *available at* http://www.progressivereform.org/articles/Truth_About_Torts_CPSC_807.pdf; William Funk et al., *The Truth about Torts: Regulatory Preemption at the National Highway Traffic Safety Administration* (Ctr. for Progressive Reform, White Paper 804, 2008), *available at* http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf.
[3] *See* American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011).
[4] 12 U.S.C. § 5518.
[5] Consumer Fin. Protection Bureau, *Small Business Advisory Review Panel for Potential Rulemaking on Arbitration Agreements: Outline of Proposals Under Consideration and Alternatives Considered* (Oct. 7, 2015), *available at* http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf [hereinafter *Outline of Proposals*].
[6] 12 U.S.C. §5518(b) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.").
[7] 12 U.S.C. § 5518(a).
[8] 12 U.S.C. § 5518(b).
[9] CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, §1028(A), section 1 at 5-6 (2015), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter ARBITRATION STUDY].
[10] The full text of the preliminary CFPB study is included in the March 2015 final version of the study.
[11] ARBITRATION STUDY, *supra* note 9, section 1 at 6.
[12] *Id.*
[13] *Id.* section 2 at 8.

Endnotes (cont'd)

[14] *Id.* section 2 at 44. While forced arbitration clauses that prohibited class arbitration effectively foreclose the ability of plaintiffs to proceed with their claims as a class action in court, CFPB found that some contracts also expressly prohibited class actions in court.
[15] *Id.* section 1 at 11.
[16] *Id.* section 1 at 12. As noted below, the CFPB indicated in its pre-proposal outline that because of these limited data on arbitration claims, it lacked sufficient evidence to conclude that prohibiting forced arbitration for individual claims would protect consumers.
[17] ARBITRATION STUDY, *supra* note 9, section 3 at 11-15.
[18] *Id.* section 5 at 41-42.
[19] *Id.* section 10 at 15-17.
[20] Letter from Al Franken, U.S. Senator, et al. to Richard Cordray, Director, Consumer Fin. Protection Bureau (May 21, 2015), *available at* http://www.franken.senate.gov/files/documents/150521CFPBarbitrationLetter.pdf.
[21] Letter from AFL-CIO et al. to Richard Cordray, Director, Consumer Fin. Protection Bureau (Mar. 24, 2015), *available at* http://www.consumeradvocates.org/sites/default/files/Ltr%20to%20CFPB%20arbitration%20FINAL%203-24-2015%20updated%205-18-15.pdf; Letter from ACTION Housing, Inc. et al. to Richard Cordray, Director, Consumer Fin. Protection Bureau (Apr. 2, 2015), *available at* http://www.citizen.org/documents/cfpb-arbitration-rule-support-letter-april-2015.pdf.
[22] *Outline of Proposals*, supra note 5, at 14-16.
[23] *Id.* at 19-21.
[24] *See* FRANK ACKERMAN & LISA HEINZERLING, PRICE: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2003).
[25] Tim Knauss, *Syracuse-Area Unions to Share in $219 million Payout from Firms That Steered Money to Madoff*, SYRACUSE.COM, Nov. 13, 2012, http://www.syracuse.com/news/index.ssf/2012/11/investment_firms_to_pay_219_mi.html (last visited Oct. 15, 2015).
[26] David Benoit, *Bank of America Pays $410 Million to Settle Overdraft Suit*, WALL ST. J., Feb. 5, 2011, *available at* http://www.wsj.com/articles/SB10001424052748704709304576125130566408592.
[27] Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir., 2011).
[28] John C. Coates IV, *Cost Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 882, 943 (2015).
[29] Michigan v. EPA, No.14-46, slip op. at 7 (June 29, 2015).
[30] *Id.* at 14.
[31] ARBITRATION STUDY, *supra* note 9, section 8 at 4-5.
[32] *Id.* section 2 at 7.
[33] *Id.* section 1 at 10.
[34] *Id.* section 2 at 44-47.
[35] *Id.* section 3 at 3-4.
[36] *Id.* section 1 at 11.

Endnotes (cont'd)

[37] The Pew Charitable Trusts, for example, found that many contracts for consumer checking accounts are twice as long as *Romeo and Juliet*. Pew Charitable Trusts, *Checking Account Risks at-a-Glance*, http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/graphic-checking-account-risks-at-a-glance (last visited Sept. 30, 2015).
[38] *Concepcion*, 131 S.Ct. at 1759 (Breyer, J., dissenting) ("When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.").
[39] ARBITRATION STUDY, *supra* note 9, section 9 at 19-20.
[40] *See id.* section 8 at 4.
[41] *Id.* section 1 at 11.
[42] *Id.* section 5 at 9-10.
[43] *See* Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Study and Critique* 31-32, 38 (Mercatus Ctr. Working Paper, August 2015), *available at* http://mercatus.org/sites/default/files/Johnston-CFPB-Arbitration.pdf.
[44] ARBITRATION STUDY, *supra* note 9, section 5 at 57-70.
[45] *Id.* section 4 at 11-12.
[46] Amy Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 Nevada L.J. 37, 44 (2008), available at http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1133&context=nlj.
[47] *See* ARBITRATION STUDY, *supra* note 9, section 2 at 56.
[48] Jim Lardner, *A Corporate 'Get Out of Jail Free' Card*, U.S. NEWS & WORLD REP., Sept. 6, 2013, http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/06/forced-arbitration-is-a-corporate-get-out-of-jail-free-card (last visited Sept. 30, 2015).
[49] ARBITRATION STUDY, *supra* note 9, section 2 at 47-48.
[50] *Id.* section 2 at 51 tbl.9.
[51] *Concepcion*, 131 S. Ct. at 1760 (Breyer, J., dissenting) ("In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.").
[52] ARBITRATION STUDY, *supra* note 9, section 5 at 41-42.
[53] *Id.* section 5 at 42.
[54] *Id.* section 5 at 51-52.
[55] *Id.* section 5 at 42-43.
[56] *Id.* section 2 at 34-35.
[57] *Id.* section 2, at 39.
[58] Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, *available at* http://www.csmonitor.com/2007/0716/p13s01-wmgn.html.
[59] The impartiality requirements for federal judges are codified at 28 U.S.C. §§455 (a), (b).

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60 Arbitration Study, *supra* note 9, section 2 at 52. *See also* Am. Bar Assoc. & Am. Arbitration Assoc., Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (Mar. 1, 2004) ("The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.").
61 Arbitration Study, *supra* note 9, section 2 at 51.
62 Sheryl Gay Stolberg, *Obama Signs Equal Pay Legislation*, N.Y. Times, Jan. 29, 2009, *available at* http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?_r=0; Linda Greenhouse, *Justices Limit Discrimination Suits Over Pay*, N.Y. Times, May 29, 2007, *available at* http://www.nytimes.com/2007/05/29/washington/30scotuscnd.html.
63 *See* Arbitration Study, *supra* note 9, section 4 at 16-17.
64 Mariah Blake, *Welcome to Beautiful Parkersburg, West Virginia*, Huffington Post, Aug. 27, 2015, http://highline.huffingtonpost.com/articles/en/welcome-to-beautiful-parkersburg/ (last visited Sept. 30, 2015).
65 Arbitration Study, *supra* note 9, section 2 at 40.
66 *Id.* section 4 at 6.
67 *Id.* section 4 at 25-26.
68 *Id.* section 5 at 84-85.
69 *See* John M. Townsend, *Drafting Arbitration Clauses, Avoiding the 7 Deadly Sins*, 58 Disp. Resol. J. 1, (2003), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003898.
70 Arbitration Study, *supra* note 9, section 4 at 10.
71 *Id.*
72 *Id.* section 8 at 33.
73 Johnston & Zywicki, *supra* note 43, at 46.
74 Arbitration Study, *supra* note 9, section 5 at 29.
75 *American Express Co.*, 133 S.Ct. at 2316.
76 *Id.*
77 Arbitration Study, *supra* note 9, section 1 at 13.
78 *Id.* section 6 at 9, 43.
79 *Appliance Fires Pose a Safety Concern*, Consumer Reports, March 2012, http://www.consumerreports.org/cro/magazine/2012/03/appliance-fires-is-your-home-safe/index.htm (last visited Sept. 30, 2015).
80 Arbitration Study, *supra* note 9, section 9 at 4.
81 Letter from Nessa Feddis, Senior Vice President & Deputy Chief Counsel, Ctr. for Regulatory Compliance, Am. Bankers Assoc., et al. to Honorable Richard Cordray, Bureau of Consumer Financial Protection 8 (July 13, 2015), *available at* http://www.cfpbmonitor.com/files/2015/07/March-10-2015-Consumer-Arbitration-Study-Comment-Letter.pdf [hereinafter Trade Group Letter].
82 Arbitration Study, *supra* note 9, section 5 at 13.
83 Trade Group Letter, *supra* note 81, at 8.
84 Arbitration Study, *supra* note 9, section 8 at 4.
85 *Id.* section 5 at 9-10.
86 *See, e.g.*, Renee Lettow Lerner, *The Uncivil Jury part 1: Americans' Misplaced Sentiment About the Civil Jury*, Wash. Post, May 26, 2015,

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https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/26/the-uncivil-jury-part-1-americans-misplaced-sentiment-about-the-civil-jury/ (last visited Sept. 30, 2015).

[87] *See, e.g.*, Judge William G. Young, U.S. Federal District Court Judge, District of Mass., Remarks at Massachusetts Continuing Legal Education: In Celebration of the American Jury Trial (Oct. 2, 2014), *available at* https://www.massbar.org/media/1555636/in%20celebration%20of%20the%20american%20jury%20trial.pdf.

[88] ARBITRATION STUDY, *supra* note 9, section 10 at 6.

[89] *Id.* section 10 at 15.

[90] *Id.* section 10 at 18.

[91] *See* Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), *available at* http://www.healthytomorrow.org/attachments/prosper.pdf.

[92] Shapiro & Irons, *supra* note 91, at 20.

[93] *Id.*; *see also* Eban Goodstein, *The Trade-off Myth: Fact and Fiction About Jobs and the Environment*, 35-37 (1999). (summarizing data from 1970-90 and finding similarly small numbers of workers being laid off because of environmental regulations).

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[95] CARY COGLIANESE, ADAM M. FINKEL & CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS? (2013).

[96] U.S. GOV'T ACCOUNTABILITY OFF., FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT 17 (2013), *available at* http://www.gao.gov/assets/660/651322.pdf.

[97] Ctr. on Budget & Pol'y Priorities, *Chart Book: The Legacy of the Great Recession*, Sept. 9, 2015, http://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession (last visited Sept. 30, 2015).

[98] ARBITRATION STUDY, *supra* note 9, section 2 at 10, 14. The CFPB lacked adequate data to determine whether a similar pattern held for the prepaid card, payday loan, private student loan, and mobile wireless third-party industries. *Id.* section 1 at 10.

[99] *Id.* section 2 at 44-45.

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