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The CFPB Anti-Arbitration Proposal: Let's Just Give Arbitration a Chance.

Ramona L. Lampley
St. Mary's University School of Law

KCON XI ESSAY

THE CFPB ANTI-ARBITRATION PROPOSAL: *LET'S JUST GIVE ARBITRATION A CHANCE.*

RAMONA L. LAMPLEY*

* Ramona L. Lampley is a Professor of Law at St. Mary's University School of Law, where her scholarship focuses on contracts, procedure, and dispute resolution. This Essay culminates from the keynote panel presentation at the 11th Annual International Conference on Contracts, *The Consumer Financial Protection Bureau, Contracts and Arbitration Law.* Thank you to Peter Linzer, moderator, for suggesting this panel and to my co-panelists, Professors Jean Sternlight and Richard Frankel. I would also like to thank Professor Colin Marks for inviting me to be a part of this panel and all attendees for their helpful and provoking comments. Finally, I owe special thanks to my dedicated research assistants Tim Poll and Daniel Haley for their suggestions and comments.

I. INTRODUCTION

In October 2015, the Consumer Financial Protection Bureau (CFPB) announced that it would propose a rule banning class action waivers in arbitration agreements for consumer financial services products.[1] This proclamation came to fruition in May 2016 when the CFPB proposed 12 C.F.R. part 1040 and sought public comment on the proposed rule.[2] The CFPB claims that the class-waiver, often imbedded in consumer arbitration agreements, gives companies a "free pass from being held accountable by their customers[,]" comparing it to the relief a consumer can obtain as being part of a class action.[3] At the same time, the CFPB proposed reporting requirements to the CFPB in the individual cases that proceed to arbitration.[4] Tellingly, however, when the CFPB published its proposed rule, it chose to exclude federal and state government financial entities from the ban on class-waivers.[5] This panel on *The CFPB, Consumer Contracts, and Arbitration* convened as part of the 11th Annual International Conference on Contracts (K-CON XI) to discuss the CFPB's recent arbitration study, and its arbitration proposal, as a foundation for discussing arbitration in the

1. Richard Cordray, CFPB Dir., Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing (Oct. 7, 2015), (transcript available at http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007 [hereinafter Cordray, Prepared Remarks].

2. *See* Arbitration Agreements, 81 Fed. Reg. 32,830, 32,925 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) [hereinafter Arbitration Agreements]. The proposed rule provides:

> A provider shall not seek to rely in any way on a pre-dispute arbitration agreement entered into after the date set forth in § 1040.5(a) with respect to any aspect of a class action that is related to any of the consumer financial products or services covered by § 1040.3 including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

Id.

3. Cordray, Prepared Remarks, *supra* note 1.

4. *Id. See also* Arbitration Agreements, *supra* note 2, at 32,891 (requiring pre-dispute arbitration agreements to be reported to the CFPB if "entered into after the compliance date").

5. *Id.* at 32,925.

greater world of consumer contracts. Peter Linzer, this year's lifetime achievement award recipient, proposed and moderated the spirited panel discussion. I was delighted to be joined by my two co-panelists, Jean Sternlight and Richard Frankel, who are pioneers in the consumer rights arena shaping arbitration policy. The CFPB's authority to regulate arbitration in derogation of the Federal Arbitration Act (FAA) comes from the Dodd–Frank Act, which commissioned the CFPB to conduct a study of arbitration in consumer financial services products and to propose regulations based on that study.[6] There will, no doubt, be a vociferous challenge to the CFPB's authority to impose such a drastic regulation limiting arbitration by imposing the class-action waiver ban.[7] Indeed, as this Essay was being prepared for publication, the United States Court of Appeals for the District of Columbia declared the CFPB's single-director structure *unconstitutional*, subsequently vacated its decision, and granted the CFPB's petition for a rehearing en banc.[8] The jurisdictional limit on the CFPB's proposal, as compared to all consumer contracts, is that it only has

6. Dodd–Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111–203, § 1028, 124 Stat. 1376, 2003–04 (2010) (codified at 12 U.S.C § 5518) (mandating the CFPB to conduct a study of pre-dispute arbitration agreements in consumer financial products)

7. *Id.* The CFPB has authority to "prohibit or impose conditions or limitations" on pre-dispute arbitration agreements in consumer financial products if the CFPB finds that the prohibition or imposition of limitations is in "the public interest and for the protection of consumers." *Id.* § 5518(b). But, the findings in any such rule "*shall be consistent with the study*". *Id.* (emphasis added). Any regulation implemented by the CFPB will not apply to consumer contracts entered with consumer financial services providers before the expiration of 180 days after the effective date of the regulation. *Id.* § 5518(d).

8. PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016) *vacated, reh'g en banc granted.* The D.C. Circuit analyzed the enormous power this single director structure gave the CFPB:

> The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision-making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency.
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> . . . This new agency, the CFPB, lacks that critical check and structural constitutional protection, yet wields vast power over the U.S. economy. So "this wolf comes as a wolf."

Id. (quoting Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J. dissenting)). The D.C. Circuit chose to remedy the CFPB's structural flaw not by shutting down the CFPB, but electing the narrower remedy of severing the "for-cause" director removal provision, making the CFPB Director removable at the will of the President. *Id.* The D.C. Circuit also held that the CFPB's actions against the plaintiff violated bedrock principles of due process. *Id.* The ramifications of this decision certainly affect the CFPB's unwieldy power, but the extent of that weakening remains to be seen as the case moves forward.

authority to regulate consumer financial services products.[9] The rest of the universe of consumer contracts, from products to other services, remains unregulated except in piecemeal fashion.[10] As Richard Frankel offered in his discussion, the CFPB's proposal to ban the class-action waiver sounds the death knell for mandatory pre-dispute consumer arbitration according to those in the consumer financial products industry.[11]

The class-action waiver is a well-known clause in consumer arbitration agreements that simply states something like this excerpt drawn from AT&T's mobile wireless services agreement:

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.[12]

The effect of the waiver is to (1) require binding individual arbitration, which is often capped at a certain fee for the consumer and (2) to preclude any consumer who is bound by the agreement (as they almost always are) from proceeding as a class representative or member in a judicial class action

9. 12 U.S.C. § 5518(c).

10. Congress has implemented a "Swiss-cheese" approach when it comes to consumer arbitration agreements, prohibiting the agreement in some isolated instances. For example, the Dodd–Frank Wall Street Reform and Consumer Protection Act precludes pre-dispute exclusive arbitration agreements in residential-loan contracts. 15 U.S.C. § 1639c(e)(3) (2012). Other examples include 7 U.S.C. § 26(n)(2) (2012) (pre-dispute arbitration agreements not enforceable for commodity whistleblower claims); 10 U.S.C. § 987(e)(3), (f)(4) (2012) (rendering arbitration agreements unenforceable for military members and families for payday loans and consumer-credit contracts, other than residential mortgages and car loans); 15 U.S.C. § 1226(a)(2) (2012) (precluding automobile-dealer franchise pre-dispute arbitration agreements); and 18 U.S.C. § 1514A(e) (2012) (precluding waiver of rights and remedies of whistleblower claims under the Sarbanes-Oxley Act, including by pre-dispute arbitration agreement). *See also* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 n.92 (2015) (exhibiting a variety of consumer and employment claims that remain unregulated).

11. Richard Frankel, *"What We Lose in Sales, We Make Up in Volume": The Faulty Logic of the Financial Services Industry's Response to the Consumer Financial Protection Bureau's Proposed Rule Prohibiting Class Action Bans in Arbitration Clauses.*, 48 St. Mary's L.J. 283, 286–87 (2016). *See also U.S. Chamber of Commerce Statement on CFPB Field Hearing on Arbitration*, U.S. CHAMBER COM. (Oct. 7, 2015, 11:30 AM), https://www.uschamber.com/press-release/us-chamber-statement-cfpb-field-hearing-arbitration ("If a CFPB rule eliminates class action waivers, thus opening the litigation floodgates, then arbitration for most consumers will likely disappear.").

12. *AT&T Service Agreement*, AT&T ¶ 6, https://www.att.com/equipment/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service+Agreement (last visited Feb. 28, 2017).

or class arbitration. The Supreme Court held that such class waivers are enforceable in *AT&T Mobility LLC v. Concepcion*,[13] when it held that a California judicial doctrine declaring class-waivers unconscionable was preempted by the FAA.[14] It affirmed that rule in *American Express Co. v. Italian Colors Restaurant*,[15] when it held that the class-waiver did not deprive individual litigants the prospective ability to vindicate low-value individual claims.[16] Professor Frankel argues that business withdrawal from arbitration upon prohibition of the class-action waiver shows that arbitration has been a way to stifle the class action, but in my view this debate has always centered on the question of individual arbitration versus the efficacy of the class action. Indeed, CFPB Director Richard Cordray touted the money garnered by class actions in his speech bolstering support for the class-waiver ban, claiming that consumer financial services "group lawsuits delivered, on average, about $220 million in payments to 6.8 million consumers per year."[17] To put it bluntly, the public policy debate is about individual binding arbitration versus the class action.

This Essay, which is based on my K-CON panel presentation and comments made during the discussion period, makes three points: (1) individual arbitration, rightly done, can be more advantageous for the individual consumer than the class action; (2) the CFPB's ground-breaking empirical study does not support the CFPB's drastic proposal to eliminate the class waiver, and therefore, consumer arbitration; and (3) the CFPB, and Congress, in later consumer action, should take a more cautious and

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13. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

14. *Id.* at 346–47. For a discussion of the Supreme Court's pro-arbitration jurisprudence under the FAA, see Ramona L. Lampley, *"Underdog" Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727, 1736 (2015) (discussing the Supreme Court's pro-arbitration jurisprudence under the FAA). *See also* Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2862–77 (2015). The 2015 CFPB study on arbitration included mobile wireless providers, based on the premise that consumers can charge expenses, such as ringtones, through their phone bills. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 2.3.6, at 25 (2015), [hereinafter CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS]. The CFPB proposal extends to the mobile wireless industry, which is dominated by class-arbitration waivers. But the nature of the classification of the mobile wireless industry as a consumer financial service, itself, shows that the CFPB views its own authority as expansive. *See* Arbitration Agreements, *supra* note 2, at 32,877 ("[A] wireless, wireline, or cable provider that allows consumers to initiate payments to third parties through its billing platform would be covered by proposed § 1040.3(a)(8).")

15. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

16. *See Id.* at 2312 (rejecting the "argument that class arbitration [i]s necessary to prosecute claims 'that might otherwise slip through the legal system.'") (quoting AT&T Mobility Co. v. Concepcion, 563 U.S. 333, 351 (2011)).

17. Cordray, Prepared Remarks, *supra* note 1.

deliberate approach to incentivize fair and transparent consumer arbitration. Because this Essay reflects our discussion during the K-CON XI panel, we move through some complicated issues quickly. Nevertheless, some background is necessary to provide a foundation for the policy proposed herein. To that end this Essay will first discuss why consumer arbitration could be beneficial to the consumer. Section III explains why the CFPB's class-waiver ban will effectively kill this relatively new alternative dispute forum for the consumer. Then, Section IV provides an overview of the CFPB study, posits that the CFPB study does not support regulatory action to promote the class device at the expense of removing the burgeoning avenue of dispute resolution, and compares the current status of consumer arbitration in the United States to evolving consumer dispute resolution in the European Union. Finally, this Essay ends with a call to Congress and federal agencies to regulate consumer arbitration in a way that promotes transparency, consumer education, and further development of this potentially promising arena for low-cost dispute resolution.

II. MAKING THE CASE FOR CONSUMER ARBITRATION

Theoretically, consumer arbitration done right should *work*—theoretically, that is. Assume we have a hypothetical consumer claim for \$200 in excess fees against her credit card company. The consumer has a range of choices: (1) call the credit card company and attempt to resolve the dispute informally; (2) cancel her credit card; (3) file a civil dispute in court; (4) proceed individually in arbitration; or (5) participate as a member of a class action. Option 1 is the most attractive in that it involves little cost or time on the part of either disputant. If resolved, the customer walks away happy and the company gets to retain a loyal customer. But what if the parties cannot resolve the dispute? Option 2 may be a market solution, but does nothing to make the consumer whole for the alleged wrong. Two hundred dollars is a lot of money to most consumers, so we should assume the consumer wants to pursue the claim, depending on cost and effort. The consumer could file a civil action, whether it be in small claims court (as it should be here), or in county court for larger claims. The downside to filing even a small claims action is, of course, the typical barriers to entry—fees and time. For a small claims court action in Bexar County, Texas (the location of K-CON XI and St. Mary's University School of Law), the filing fee is only \$46.00, but then my consumer may have to pay for service of process, which adds \$75.00.[18] Already my hypothetical plaintiff has nearly

18. *2016 Filing Fees*, BEXAR CTY. JUSTICES OF THE PEACE http://home.bexar.org/

eroded her likely recovery simply by fees. If she has a case for more damages that is also more complex, she could be facing a filing fee of at least $282.00 (Bexar County Court) plus the costs of service, discovery, and proving her case through a hearing, motions, or even trial.[19] All this assumes she has some familiarity with the court system so that she can navigate the rules of procedure sufficient to file a complaint and effectuate service of process. The filing fees, complex procedural rules, and trial expenses are all barriers to the consumer seeking individual relief for this low-value, but not quite *de minimis* claim.[20]

Then comes the class action, which is a proposed solution for vindicating the claims that are too small to pursue individually. But for my hypothetical consumer, she is out real money and if her case is proven, she seeks the remedy of the full $200 (or close to it). As a member of a class, her likelihood of receiving near full damages is not good. Anecdotally, we can all think of class action settlements awarding the consumer cents on the dollar, or worse, a coupon for a new product.[21] Indeed, the Jimmy John's class-action "pickle" settlement, awarding the customer a $1.40 voucher for a side item (pickle, potato chips, or a cookie) *after* filling out settlement request forms proves the point too well—many consumer class action settlements are not worth the paper the settlement notice is printed on.[22]

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jp/filing_fees.html (last visited Feb. 28, 2017).

19. *Bexar County District Clerk Fee Schedule*, BEXAR CTY. DIST. CLERK http://home.bexar.org/dc/costs.html (last visited Feb. 28, 2017).

20. Thank you to Professor Keith Rowley, University of Nevada Law Vegas William F. Boyd School of Law, for pointing out that under Rule 131 of the Texas Rules of Civil Procedure, the prevailing party is entitled to an award of the costs. This may provide an incentive to pursue the individual action for low-value claims. However, given the reality that most civil cases settle, I wonder to what extent the cost-shifting is taken into account in settlement discussions.

21. Professor Brian Fitzpatrick and Robert Gilbert find a wide range of recovery rates, (average compensation as a percentage of damages) ranging from 6%–69% in their study of fifteen "small-stakes" consumer class actions against large domestic banks. Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 1 N.Y.U. J.L. & BUS. 767, 770 (2015). They found the average payout ranged from $13 to $90, with a wide variation in compensation rates (realized compensation) between 1%–70%. *Id.* There is limited empirical data regarding consumer class action compensation to the individual class member. Linda Mullenix, *Ending Class Actions as We Know Them*, 64 EMORY L.J. 399, 418–19 (2014). Even the study referenced above is limited to fifteen related class action settlements. A related issue is the risk that class actions create an incentive for private enforcement of somewhat frivolous claims or minor misconduct. Professor Richard Marcus discusses these risks in his article *Bending in the Breeze, American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 525–29 (2016).

22. William Choslovsky, *Sue Jimmy John's, Get a Free Pickle*, CHI. TRIB. (Sept. 30, 2014, 4:51 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-jimmy-johns-class-action-settlement-perspec-100-20140930-story.html. According to the story, the named plaintiff received $5,000 for her claim that Jimmy John's listed some sandwiches as containing alfalfa sprouts, when the sandwiches had no sprouts, and the plaintiff-class attorneys received $370,000. *Id.* *See also* Joint

If my hypothetical consumer is willing to wear the mantle of named plaintiff, sign complaints, interrogatories, and possibly appear for a deposition, she stands the chance of being made more than whole ($5,000 for misrepresented alfalfa ingredients), but the ordinary consumer class member will more often be afforded nominal or meaningless recovery in the form of a coupon, an additional "side product," or a pittance recovery, and that only after proving entitlement to relief through a "claims made" process.

Then take individual arbitration. Assume the arbitration agreement meets the "gold standard" in that it takes the form of the agreement at issue in *Concepcion.* In this consumer-friendly arbitration agreement, the consumer waives the class device through a mandatory contract. True, there is little meeting of the minds. The consumer, by continued use of the product, agrees to the terms and conditions imposed by the provider. But, in the gold-standard agreement, the business pays *all* costs of arbitration.[23] Even in an inferior arbitration agreement, if the arbitration is to proceed before the American Arbitration Association (AAA) (which is the most widely selected provider), consumer fees are capped at $200 for disputes under $10,000.[24] Additionally, as part of the AT&T type of agreement, the consumer has an "incentive" to pursue the dispute. If the consumer wins an amount greater than AT&T's last written settlement offer prior to arbitrator selection, AT&T guarantees the consumer an award of *at least* $10,000, expenses, costs (including expert witness fees), and double attorneys' fees.[25] Thus, as the Supreme Court observed in enforcing the *Concepcion* arbitration agreement:

> The [d]istrict [c]ourt found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole. Indeed, the [d]istrict [c]ourt concluded that the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few

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Stipulation of Class Action Settlement, Starks v. Jimmy John's LLC, No. BC501113 at 3 (Cal. Sup. Ct. Aug. 1, 2014) (settling and releasing all claims against Jimmy John's in the matter).

23. *AT&T Service Agreement*, *supra* note 12, at ¶ 2.2(3). This Essay uses the AT&T agreement as it presently exists. It is largely the same in principle as the agreement at issue in *Concepcion*, although the incentive values have increased.

24. *Costs of Arbitration*, AM. ARB. ASS'N, https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased (last visited Feb. 28, 2017).

25. *AT&T Service Agreement*, *supra* note 12, at ¶ 2.2(4). The attorney's fee award supplements fee shifting provisions under applicable law, but does not permit duplicative recovery. *Id.* at ¶ 2.2(3).

dollars."[26]

One might look at this incentivizing agreement and argue AT&T should never have to pay the $10,000 incentive and double attorneys' fees, because it should always settle to avoid the payout (for claims less than $10,000). But that result is advantageous for the consumer because it puts the incentive on AT&T to settle for a reasonable amount even for claims that are not clearly meritorious, all before the arbitrator is selected, in a dispute resolution mechanism that is free for the consumer. In theory, consumer arbitration stands to offer a better opportunity for real remedy to the individual consumer than the consumer would realize as a member of a class. A consumer may rationally choose to waive very low-value claims one would only pursue as a class member,[27] to preserve a fee-free dispute resolution module for individual claims that provide an opportunity to be made whole.[28] But this is not to say that individual arbitration works this way, yet. Individual arbitration is still in a relatively early stage of evolving towards a more consumer-friendly module, having gone through a series of changes in the late 1990s and 2000s as more corporate entities began imposing the arbitration-class waiver. As courts examined more and more arbitration agreements, the agreements began to evolve to more consumer-friendly, business subsidized, incentivizing types of agreements.[29] Many consumer arbitration agreements now require any hearing to be held in the

26. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (first quoting Laster v. AT&T Mobility LLC, 584 F.3d, 849, 856 n.9 (9th Cir. 2009); then quoting and Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *12 (S.D. Cal. Aug. 11, 2008)).

27. Director Cordray quoted Judge Richard Posner as having said, "[O]nly a lunatic or a fanatic sues for $30." Cordray, Prepared Remarks, *supra* note 1.

28. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 512–18 (2009) (arguing that the consumer is actually better off in alternative dispute resolution in a corporation-pays-all type agreement with a premium for winning, such as the one at issue in *Concepcion*).

29. *See* Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1293 (9th Cir. 2006) (holding a forum selection clause requiring the California plaintiff to arbitrate in Boston unconscionable); *see also* Ting v. AT&T, 182 F. Supp. 2d 902, 932 (N.D. Cal. 2002) (holding a confidentiality provision unconscionable), *rev'd on other grounds*, 319 F.3d 1126 (9th Cir. 2003); McDonald v. Cash N Advance (*In re* Lucas), 312 B.R. 407, 411–12 (Bankr. D. Nev. 2004) (holding a unilateral right to select an arbitrator substantively unconscionable); Gutierrez v. Autowest, Inc., 7 Cal Rptr. 3d 267, 277 (Cal. Ct. App. 2003) (holding a requirement for upfront consumer arbitration fees unconscionable); Swain v. Auto Servs., Inc., 128 S.W.3d 103, 108–09 (Mo. Ct. App. 2003) (discussing an arbitration clause including a forum selection clause requiring arbitration in another state and precluding attorney's fees); Bellsouth Mobility LLC v. Christopher, 819 So. 2d 171, 173 (Fla. Dist. Ct. App. 2002) (holding a limitation of liability to actual damages substantively unconscionable); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (discussing the limitation of liability to actual damages).

consumer's home town, include a small claims court carve-out, and have no confidentiality requirement.[30] But consumer-arbitration clauses are largely unregulated by the government or the courts. Section 2 of the FAA permits courts to render arbitration agreements unenforceable on state law grounds,[31] but the Supreme Court's holding in *Italian Colors* did nothing to signal to state and federal lower courts that fee or cost barriers to arbitration are generally unconscionable.[32] Indeed, the business to business (American Express to small business owner) arbitration agreement held enforceable by the Court in *Italian Colors* lacked the business-pays-all and incentivizing clauses that were essential to an implied assessment of fairness in *Concepcion*.[33] Following *Concepcion* and *Italian Colors*, a fruitful field for congressional and agency regulation should be fostering free and fair arbitration for the consumer. Specifically, the CFPB (and Congress) could have required consumer arbitration to be (1) fully business funded; (2) with an incentive for meritorious claims proceeding to adjudication; (3) to award attorneys' fees plus a premium for meritorious claims to incentivize representation; (4) preclude confidentiality of consumer arbitration filings or results; (5) to require a written statement of opinion; (6) require more data-reporting so that detection of bias and wrongdoing becomes more likely; and (7) enlarge appellate review to include instances of manifest disregard for the law.[34]

The view that consumer arbitration may be an adequate substitute for class litigation raises one question: How does the individual consumer fare in arbitration? Indeed, that has been the focus of some consumer studies and many employment arbitration studies, to the extent data is available. Looking at consumer "win" rates to assess fairness is almost necessarily doomed to be slanted against corporate entities. The most comprehensive

30. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 2.5.2, at 33, § 2.5.8, at 51–52.

31. Federal Arbitration Act, 9 U.S.C. § 2 (2012) (declaring arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

32. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013). In *Italian Colors*, the Supreme Court reversed the Second Circuit Court of Appeals decision holding an arbitration agreement between American Express and several small business owners unenforceable due to the cost of litigating individual antitrust claims. *Id.* The Court instead held that even when a plaintiff's cost of arbitration exceeds the potential recovery, courts cannot refuse to enforce contractual class arbitration waivers. *Id.* at 2306.

33. *Id.* at 2312.

34. There are any number of measures Congress could take to permit consumer arbitration to develop as a fair alternative dispute resolution module, while also alleviating the concerns that have developed over time. Some of these solutions were apparent through the arbitration agreement held as enforceable in *Concepcion*. I urge Congress to adopt others in *"Underdog" Arbitration: A Plan for Transparency*, *supra* note 14.

consumer study done to date, the CFPB study on arbitration, found in consumer arbitration cases that resulted in a merits decision, consumers "won" something in 20.3% of cases involving affirmative consumer claims.[35] The average and median awards were $5,400 and $2,700 respectively, meaning when consumers did win, they won an average of .57 cents on the dollar per amount claimed.[36] In contrast, businesses fared much better, winning 93% of company disputes and .98 cents for every dollar claimed.[37] But 26% of those company "wins" were due to *ex parte* judgments against a consumer who never participated in the arbitration and for whom the business paid the arbitration fees.[38] The Searle Civil Justice Institute Report on Consumer Arbitration found similar results, with consumers "winning" some relief in 53.3% of cases consumers brought (128 out of 240) and businesses winning some relief in 83.6% of cases (51 out of 61).[39]

It is tempting to look at the difference in win rates and conclude that arbitration is not fair for consumers. But that would be a false assumption. One cannot make an assessment of arbitration by simply comparing consumer win rates to business win rates. First, the sample size of arbitration merit decisions is small: only 341 total cases for a two-year period resulted in a decision on the merits.[40] More importantly, the study shows that most arbitration disputes resolved in a manner consistent with settlement.[41] Second, differing incentives to assert claims can explain some

35. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.2.2, at 13. Even in this comprehensive report, the sample size of affirmative consumer claims resulting in a merits decision was low, at 158 cases. *Id.*

36. *Id.*

37. *Id.* § 5 at 14.

38. *Id.* This imbedded data shows another problem with consumer arbitration that the CFPB could have regulated—to what extent should a company be able to obtain a default-judgment equivalent in arbitration by fronting the consumer fees? This practice resulted in a high number of business "wins" accounting for 26%. *Id.*

39. SEARLE CIVIL JUST. INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT 67–68 (2009), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_010205 [hereinafter SEARLE CIVIL JUST. INST., PRELIMINARY REPORT]

40. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.2.2, at 13.

41. *Id.* § 5 at 11. As the authors of the study diligently explained:

> [T]he minority of disputes that reach an arbitrator decision on the merits are not a random subset of disputes that are filed, because parties may make different settlement decisions for different types of claims. Parties settle claims strategically. For example, if the parties settle all strong consumer (or company) claims filed, that will affect the types of disputes on which arbitrators rule. Consumers (or companies) may appear to do poorly—or to bring only weak claims—but that may result from settlement decisions as well as (or more than) from the arbitration process

of the difference in outcomes. If a business funds all or most of the dispute resolution process, consumers are incentivized to bring claims of questionable merit. Yet for the business which must pay all or most of the upfront costs ($1,500 per consumer claim under AAA rules),[42] the incentive is to not bring (1) low-value claims or (2) claims of questionable merit. Still further, about 26% of the business wins were due to dispute resolutions in which the business paid the customer fees, but the customer did not participate or contest the allegations.[43] Even if this data was available, the usefulness of it is in comparing it to how individual consumer litigants fare in *litigation*, not how companies perform as compared to consumers.[44] And again, even if we had that data, certain qualifications would have to be made: (1) Do consumers bring different types of cases to arbitration than to court, particularly under incentivizing clauses or a business-pays-all clauses?;[45] (2) Are businesses more likely to settle claims with merit in arbitration to avoid an incentivizing penalty?; (3) How do procedural devices such as motions to dismiss or motions for summary judgment which enable courts to weed out non-meritorious claims affect litigation "win" rates as compared to arbitration, which typically does not have those devices? Any analysis of comparative data between arbitration and litigation win/loss rates would need to try to control for these procedural differences.[46] The CFPB noted the deficiencies in cautioning against comparative use of win-rate data, stating: "These various considerations warrant caution in drawing conclusions as to how well consumers or companies fare in arbitration as compared to litigation. The frequency analysis shows, in significant respects, the disputes that are filed in arbitration differ from the disputes that are filed in litigation."[47]

Accounting for these selection biases and other reasons win rates may be disparate, the data gleaned from such studies will continue to be useful in making some conclusions regarding the fairness of consumer arbitration. But that assessment is premature because consumers are not filing many cases (yet),[48] consumers and attorneys need more education about

itself.

Id. § 5 at 5.

42. *Costs of Arbitration*, *supra* note 24.

43. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.2.2, at 14.

44. SEARLE CIVIL JUST. INST., PRELIMINARY REPORT, *supra* note 39.

45. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.1, at 7.

46. *See, e.g.*, Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 558 (2008) (discussing flaws in assessing raw-win rates and comparative-win rates to assess fairness of arbitration).

47. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.1, at 7.

48. *Id.* § 5 at 19 (stating that consumers filed about 1,234 consumer financial services arbitration

arbitration as an alternative forum, and analysts need more robust data sets from providers other than the AAA. But, as more fully explained *infra* Section III.B, there are some data that signal that consumer arbitration can be a useful alternative to the class action for vindication of consumer claims.

III. WHY THE CFPB CLASS-ACTION WAIVER PROPOSAL WILL EFFECTIVELY KILL CONSUMER ARBITRATION FOR CONSUMER FINANCIAL PRODUCTS (AND IS PREMATURE).

When the CFPB announced its plans to ban the class-action waiver, the consumer financial products industry responded that they would withdraw from arbitration all together.[49] Professor Richard Frankel, my co-panelist, argues that this is indicative of the consumer financial services industry's interest in avoiding class actions through the use of pre-dispute arbitration with class-action waivers. I agree. As stated at the beginning of this Essay, the analysis of the fairness of arbitration must include a utilitarian comparison of arbitration versus the class action. And it is no secret that corporate America has found shelter from some abusive class-action tactics by providing for subsidized dispute resolution for the consumer at the individual level. Professor Frankel argues that if arbitration is a better alternative, why not allow individuals to opt in to arbitration after a dispute has arisen, and still preserve the option for a class vehicle.[50] But this argument does not account for the cost-benefit analysis undertaken by companies who choose to adopt an arbitration agreement for consumers.

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disputes from 2010–2012, an average of 411 per year, which is very low for consumer filings); *see also id.* § 5 at 11.

49. The Consumer Financial Services Group stated the effect of the CFPB's proposal:

> Although the CFPB's proposal reflects an inclination not to outright prohibit the use of arbitration, let's make it perfectly clear. By requiring companies to insert in their arbitration provisions language excepting class actions from arbitration, the Bureau is in reality proposing an outright ban. If this proposal becomes a final regulation, most companies will simply abandon arbitration altogether.

Consumer Fin. Servs. Grp., *CFPB to Consumer Financial Services Companies: Prepare to Wave Goodbye to Class Action Waivers*, BALLARD SPAHR LLP (Oct. 7, 2015), http://www.ballardspahr.com/alertspublications/legalalerts/2015-10-07-cfpb-to-consumer-financial-services-companies-prepare-to-wave-goodbye.aspx; *see also* Consumer Bankers Ass'n, Comment Letter on CFPB's Proposed Rulemaking on Arbitration (March 16, 2016), http://consumerbankers.com/cba-issues/comment-letters/joint-trades-letter-record-hfsc-hearing-31616 (urging the Bureau to "[d]etermine if prohibiting or restricting the availability of mandatory pre-dispute arbitration provisions would effectively eliminate arbitration as an alternative dispute resolution process for the majority of consumers").

50. Richard Frankel, Drexel Univ., Presentation at the International Conference on Contracts: Will the CFPB's Class-Action Proposal Drive Companies Away from Binding Mandatory Arbitration? (Feb. 27, 2016).

By imposing individual arbitration, the company should undertake to fund some part of the dispute resolution process or risk a finding that the agreement is unconscionable due to high fees.[51] The leading arbitration providers require businesses to pay most of the arbitration fees,[52] and many companies fully fund consumer arbitration in an effort to make it consumer-friendly.[53] By effectively forcing a consumer with no bargaining power into arbitration, the company undertakes to subsidize that alternative dispute arena to provide the consumer with a reasonably accessible forum for resolution. This increases costs to the company, but those costs are worth it to avoid the financial stress of multiple class actions. The simple trade-off is that the business pays for the arbitration—but if the threat of the class device, with heavy attorneys' fees and litigation costs remain, it makes no economic sense to fund a select few consumer claims after a dispute arises.[54]

More plainly, the specter of class arbitration is something companies rightfully avoid.[55] Justice Scalia remarked on this trade-off five years ago in *Concepcion*, observing that if consumers remain free to resolve their disputes in arbitration or in court, "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis."[56] Class arbitration is unwieldy. Discovery must be had on issues of numerosity, commonality of claims, typicality or individuality of issues, and whether the class representatives fairly and

51. *See* Circuit City Stores, Inc., v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (holding "the fee allocation scheme alone would render an arbitration agreement unenforceable").

52. *See Costs of Arbitration*, *supra* note 24 (capping consumer fees at $200 for cases in which less than $10,000 is at issue and requiring business to pay $1700 filing fee and $750 arbitrator fee for a desk arbitration in which no hearing is held); *see also* JAMS Policy on Consumer Arbitration Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (eff. July 15, 2009) (capping consumer fees at $250).

53. *See, e.g., AT&T Service Agreement*, *supra* note 12, at ¶ 2.2(4); *see also Netflix Terms of Use*, NETFLIX § 15(e), https://www.netflix.com/TermsOfUse (last updated May 5, 2016) (noting that Netflix will promptly reimburse consumers for filing fees after receiving notice).

54. *See* Am. Bankers Ass'n, et al., Comment Letter on the CFPB's Consumer Arbitration Study, at 10 (July 13, 2015), http://consumerbankers.com/sites/default/files/July%2013%202015%20Consumer%20Arbitration%20Study%20Comment%20Letter.pdf ("Conversely, if the Bureau were to over-regulate arbitration agreements or prohibit the use of class action waivers in such agreements, as some advocate, many companies would likely discontinue offering arbitration to customers.").

55. For a discussion of class action *over-enforcement* of public or societal interests, see Marcus, *supra* note 21, at 525–29 (discussing class actions asserted for seemingly minor misconduct, such as Kellogg's claim that Frosted Mini-Wheats improved children's cognitive function).

56. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347 (2011).

adequately represent the class.[57] There are important procedural phases, from threshold dispositive motions to class certification, and finally summary judgment. The entire process is one created by and bounded by the rules of procedure, with the guarantee of judicial appellate review. Arbitration, with its ability to discard the formality of procedure, is not suited for the class device.[58] And it is worth noting that even though the CFPB has concluded that class actions are a more appropriate vehicle for dispute resolution for consumers versus private companies, it excluded government entities from the class-waiver ban.[59] To put it simply, without the class-action waiver, companies have no economic benefit to subsidize dispute resolution for the consumer or to offer individual settlement terms. This puts the conversation squarely to a debate between individual arbitration versus advantages of the class to the individual consumer or the societal whole. And this is why, based on the data obtained thus far, that the CFPB's rule proposing a class-action waiver ban is both premature and reaches too far beyond the realities supported by the CFPB study.[60]

IV. THE CFPB STUDY SHOWS THAT CONSUMER ARBITRATION IS A PROMISING DEVELOPMENT FOR REAL INDIVIDUAL REMEDIES IF CAUTIOUSLY REGULATED BY CONGRESS OR AGENCIES.

On October 7, 2016, in a field hearing in Denver, Colorado, CFPB Director Cordray announced that the CFPB will propose a rule banning the class action waiver and requiring more data-reporting in the cases that proceed to individual arbitration.[61] As discussed in the preceding section, this will effectively kill subsidized consumer arbitration. In support of this proposal, Cordray described individual arbitration and the class action waiver as a "free pass" secured by financial services providers to make sure "customers cannot group together to seek relief for wrongdoing."[62] Cordray touted the class action recoveries delivering "on average, about $220 million in payments to 6.8 million consumers per year in consumer

57. FED. R. CIV. P. 23.

58. Concepcion, 563 U.S. at 348 ("Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes.").

59. Arbitration Agreements, *supra* note 2, at 32,925.

60. Recall that Congress gave the CFPB the authority to "prohibit or impose conditions or limitations on the use of an agreement . . . for arbitration . . . if the Bureau finds that such a prohibition or imposition . . . is in the public interest and for the protection of consumers . . . [but the findings] shall be consistent with the study . . . ." 12 U.S.C. § 5518(b) (2012).

61. Cordray, Prepared Remarks, *supra* note 1. The CFPB proposed the rule in May 2016. Arbitration Agreements, *supra* note 2, at 32,891.

62. Cordray, Prepared Remarks, *supra* note 1.

financial services cases."[63] By drawing this conclusion, Director Cordray made the decision that class actions are preferable to individual arbitration. The CFPB study does not support this conclusion.[64]

A. *Setting the Stage: The CFPB Report and Prior Research.*

The groundbreaking and thorough arbitration study conducted by the CFPB provided useful insight into this burgeoning arena of consumer arbitration. Up until this research, empirical studies of consumer arbitration were limited and few in number.[65] In 2009, the Searle Civil Justice Institute (SCJI) published a report on consumer arbitration,[66] which, like the CFPB report, used AAA data.[67] The data set for this report was also necessarily small, consisting of 301 case files closed in an eight-month period in 2007.[68] The SCJI report found a higher "win rate" for consumers than the CFPB report, at 53.3% for affirmative consumer claims and an average recovery of $19,255.[69] Additionally, the SCJI made the following findings suggesting that arbitration may be fair for consumers (or at least was for the 301 cases studied in 2007):

- Arbitrators awarded consumers attorney's fees "in 63.1% of cases in which consumers sought such an award";
- The upfront costs for consumer claimants "appears to be quite low;" at an average of $96 for claims under $10,000; and
- AAA consumer arbitration "seems to be an expeditious way to resolve disputes."[70]

63. *Id.*

64. As noted above, the CFPB's authority to impose conditions or limit pre-dispute arbitration in consumer financial services is limited to those regulations or findings that are "consistent with" the Congressionally-commissioned arbitration study. 12 U.S.C. § 5518(b).

65. See CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.3, at 15–16 for a discussion of the limited prior research on consumer arbitration. *See also* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845, 919–27 (2010) (identifying prior empirical studies and data sets on consumer arbitration, summarizing the central findings and noting that "few studies have examined consumer arbitration in any detail"); Rutledge, *supra* note 46, at 558 (discussing empirical research in the consumer and employment context). Because this Essay focuses on consumer arbitration, studies of arbitration in other contexts such as employment or securities are not included.

66. SEARLE CIVIL JUST. INST., PRELIMINARY REPORT, *supra* note 39. These findings are explored in Drahozal & Zyontz, *supra* note 65, at 908.

67. SEARLE CIVIL JUST. INST., PRELIMINARY REPORT, *supra* note 39.

68. *Id.*

69. *Id.* The SCJI determined the business win rate was 83.6% of affirmative business claims with an average recovery of $20,648. *Id.*

70. *Id.*

In 2013, Professors Peter Rutledge and Christopher Drahozal published their empirical findings regarding consumer-credit-card-arbitration-agreement terms.[71] This study was unusual because it was based on a comprehensive data set of arbitration agreement terms in the credit card setting. The "Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (Credit CARD Act) requires all issuers to provide electronic copies of their consumer credit card agreements to the Federal Reserve," which maintains them publicly on the Internet.[72] This empirical study focused on arbitration agreement terms, and did not assess data regarding arbitration proceedings or outcomes.[73] The AAA published a short snapshot of consumer arbitration for consumer cases from January through August 2007, based on 310 consumer cases in which an award issued.[74] The AAA reported a 60% settlement rate of its approximately 1,500 consumer cases, and reported 48% and 74% consumer and business win rates, respectively.[75] Other studies focused on data from the now defunct National Arbitration Forum (NAF), which handled many consumer credit card debt collections.[76] In 2009, the Minnesota Attorney General filed suit against the NAF—the then leading debt collection arbitration forum.[77] According to the allegations, the NAF purportedly held itself out as an impartial arbitration provider while having ties to key members of the debt collection industry.[78] Within days, the NAF entered into a settlement with the Minnesota Attorney General that required it to cease arbitrating

71. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1 (2013).

72. *Id.* at 14–15 (describing and citing the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 204(a), 123 Stat. 1734, 1746–47 (codified as amended in scattered sections of 15 U.S.C., 16 U.S.C., and 32 U.S.C.)).

73. *Id.* at 15. For another survey of arbitration prevalence and terms in social media, see Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 653–54 (2012).

74. Am. Arbitration Ass'n, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 (last visited Feb. 28, 2017).

75. *Id.*

76. *See* SEARLE CIVIL JUST. INST., PRELIMINARY REPORT, *supra* note 39, at 116 (analyzing the NAF arbitrations involving consumer banking); *see also* JOHN O'DONNELL, ET AL., PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 1 (2007) http://www.citizen.org/documents/ArbitrationTrap.pdf (summarizing a study on mandatory arbitration in the credit card industry); Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1051–52 (2009); Mark Fellows, *The Same Result As in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNS., July 2006, at 32, http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf (analyzing the ability of arbitrators to come to the same conclusions consistently in different cases while providing for a more efficient process).

77. *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES (July 19, 2009), http://www.nytimes.com/2009/07/20/business/20credit.html.

78. Complaint, State v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550, 2009 WL 2029918, at *1–2 (Minn. Dist. Ct. July 14, 2009) (on file with author).

consumer debt collection cases.[79]

Professors Eisenberg, Miller, and Sherwin compared use of arbitration agreements in business-consumer and nonconsumer contracts in a select subset of twenty-one large public corporations, but again, did not analyze consumer arbitration outcomes.[80] Additionally, the Federal Trade Commission (FTC) issued a report of its findings on consumer debt collection in litigation and arbitration in 2010.[81] Again, while useful, this report is limited to consumer debt collection and is based on information from a public workshop, roundtables, and public comment. It is not an empirical consumer survey. The CFPB Arbitration Report, the SCJI arbitration report, and their precursors provide an important snapshot of information about consumer arbitration. But it is in a limited context. The two most robust reports (from the CFPB and the SCJI) are limited to AAA data.[82] Although the AAA is most likely the largest consumer arbitration provider, it is not the only provider. Thus, this data only captures a subset of information regarding consumer arbitration.[83] Data inaccessibility inhibits concentrated studies about consumer arbitration prevalence and outcomes. The number of consumer arbitrations resulting in an arbitral award in each of these studies is low. The CFPB report was based on 1,847 filings (of which 341 resulted in an award) and the SCJI report was based on 301 disputes.[84] Additionally, the CFPB based its report solely on disputes regarding consumer financial services (i.e., credit cards, payday loans, student loans, banking accounts, mobile wireless services, prepaid cards, and limited auto purchase loans).[85] Thus, any assessments of the data in these reports must be guarded with an appreciation of the limited data set and

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79. Consent Judgment, State v. Nat'l Arbitration Forum, No. 27-CV-09-18550, 2009 WL 5424036, at *1 (Minn. Dist. Ct. July 17, 2009).

80. *See* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 881–83 (2008) (examining select consumer contracts in mobile wireless providers, credit card companies, cable providers, and stock-trading services and finding 75% of the consumer contracts in the sample had arbitration clauses).

81. FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 62–63 (2010) http://www.ftc.gov/sites/default/files/documents/public_events/life-debt/debtcollectionreport_0.pdf (stating that reasoned opinions in consumer debt collection cases are rare because they must be requested by a party and are often accompanied by a fee).

82. *See* CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5, at 3 (reviewing arbitrations conducted by the AAA from 2010 to 2012); SEARLE CIVIL JUST. INST., PRELIMINARY REPORT, *supra* note 39 (examining consumer arbitrations administered by AAA).

83. In *"Underdog" Arbitration: A Plan for Transparency*, *supra* note 14, at 1727, I argue that Congress should impose data-reporting requirements on all providers handling consumer arbitrations to enhance empirical assessment of this dispute resolution forum.

84. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.2.1, at 9, § 5.2.2, 12; SEARLE CIVIL JUST. INST., PRELIMINARY REPORT, *supra* note 39.

85. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.4, at 17–18.

awareness that consumer arbitration filings are not robust.

B. *The CFPB Study Provides Some Encouraging Data Regarding Consumer Experiences in Arbitration.*

The CFPB Report must be read with an awareness of its importance, as the most robust report of its time to date, and of its limitations—specifically that it is limited to AAA data on consumer arbitration for consumer financial products. Nevertheless, it gives us an exciting window into the world of consumer arbitration and it tells us that maybe, just maybe, something right is evolving in mandatory, pre-dispute, consumer arbitration. First, most arbitrations settle or end consistent with settlement. Of the 1,060 consumer financial products or services agreements the CFPB studied that had resolved by the data collection date (2013), 23% resulted in a known settlement and 34% ended consistent with settlement.[86] Thus, nearly 60% of consumer arbitration cases studied likely settled. Only 32% of these cases resolved on the merits.[87] This should indicate to us that something "right" is happening in consumer arbitration. As discussed in Part I, above, businesses have an incentive to settle consumer cases in arbitration either due to incentivizing agreements or due to consumer filing fee limitations which place the majority of the fees on the business. The implication that most arbitrations result in a mutual resolution without resort to arbitral decision tells us that arbitration dispute resolution is developing along the lines of civil litigation practice, where we know most cases settle.

Second, Professor Sternlight and others criticize consumer arbitration compared to the class action claiming that disputants will not be able to obtain attorney representation absent the economic rewards of attorney's fees available through class action.[88] But the CFPB study found that counsel represented consumers in nearly 60% of consumer financial services or product cases.[89] One would suspect that much of this consumer representation stems from higher value claims (the median consumer claim

86. *Id.* § 5.6 at 32.

87. *Id.*

88. *See* Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 117–19 (2012) (arguing that attorneys are needed to assist plaintiffs in procedurally difficult claims and are unlikely to be economically able to provide that assistance absent the class device); *see also* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1210 (2012) ("Moreover, it is inconceivable that a private attorney, who might have sufficient expertise in consumer fraud, will have the economic incentive to root out consumer fraud if the only economic gain to be had is through individual arbitrations.").

89. *See* CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 1.4.3, at 12 (noting that "[c]ompanies almost always had counsel").

amount was $11,500 and the median disputed debt amount was approximately $11,000).[90] Although the data does not show a significant variance in outcomes based on attorney representation or lack of representation, the data set is very small, prohibiting broad conclusions.[91] Nevertheless, the study does not support the conclusion that consumer arbitration is a bar to obtaining representation.

Another concern raised by consumer arbitration critics is the potential for arbitrator or arbitration-service provider bias in favor of the repeat player. Some suggest that arbitrators may be consciously or unconsciously influenced by the fact that the corporate litigant is the paying party, and will not bring him or her repeat business if the arbitrator issues a decision or award that is not favorable to the business.[92] This "don't bite the hand that feeds you" prognosis has some basic logic to it, but does not necessarily indicate that all arbitrators have repeat-player bias. There is evidence that in employment arbitration, repeat players have tended to fare better than one-shot players.[93] But there may be many factors contributing to these

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90. *Id.*

91. *Id.* § 5.6.11 at 55.

92. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649–50 (2005).

> There are virtually an infinite number of ways in which a company, as the drafting party, can try to use an arbitration clause to gain the upper hand, including arbitrator selection, imposition of high costs, and limitation of remedies. While it would be wrong to suggest that most of these excesses are included in most arbitration clauses, some of them are quite common.

This argument has been discussed in the employment context. *See* Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 936 (1979) ("A system of private selection would be disadvantageous to employees, since an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants."); *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) ("If an arbitrator is likely to 'lean' in favor of an employer—something we have no reason to suspect—it would be because the employer is a source of future arbitration business"); Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs That Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32, 41 (2014) (concluding that adhesive arbitration bears indicia of structural bias because the disputant with superior economic control takes unilateral control over designing the dispute system for conflicts, and the arbitration agreements restrict recourse to the public civil justice system by typically removing collective action options).

93. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997) (finding that in repeat player cases, "employees won something only 16% of the time," compared with a 63% employee win rate overall, and that employees dealing with non-repeat players "recovered on average 48% of what they demanded, while employees dealing with repeat player employers recovered only 11% of what they demanded"); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 239 (1998) ("The repeat player effect is a cause for concern because in dispute resolution, sometimes the perception of fairness is as important as the reality. There is undeniably a repeat player effect in employment arbitration."). Empirical research has found an employee win rate of 32% against one-shot employers compared to 13.9% against repeat player employers, and only 11.3% where the

differential outcomes, such as the strength of the claims, the settlement rate, and award ratio and most importantly, familiarity with the process.[94] Professor Elizabeth Hill coined this the "appellate effect" in her empirical study of 200 AAA employment cases.[95] Professor Hill found that employers who repeatedly arbitrate tend to win more frequently than one-shot players, but only two of the two hundred cases in her sample involved an arbitration concerning the same company and arbitrator.[96] The fact that only 1% of the parties were truly repeat players with each other means that arbitrator bias towards the repeat party should not have demonstrated an effect. But Hill also found the win-loss record for those repeat employers who maintained an in-house dispute resolution program culminating in AAA arbitration to be much higher than those repeat employers without an in-house program.[97] Thus, according to Hill, the "effect appears to be the result of the selection processes of large employers' in-house dispute resolution programs, not merely the by-product of large employers' repeat appearances at arbitration."[98]

If the repeat-player effect is due to Hill's "appellate effect" or developing sophistication and knowledge about the process, the CFPB report shows that consumers can benefit from the effect as well—through using repeat attorneys.[99] The CFPB study panel considered a consumer a "repeat player" if represented by a law firm that represented other consumers in disputes relating to the same subject matter, consumer financial services.[100] For companies, the CFPB considered it a repeat player if the same company had appeared in more than one related consumer financial product or services dispute.[101] The study found that 45% of filings were by heavy

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repeat-player employer was paired with a repeat arbitrator. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 430 (2007). There was also a finding of a 2% win rate when a repeat employer was paired with a repeat arbitrator against a pro se claimant. *Id.* at 434.

94. *See* Drahozal & Zyontz, *supra* note 65, at 862 (collecting empirical studies and observing that "[o]verall, the empirical evidence tends to support the existence of a repeat-player effect, but suggests that the effect may be due to case screening by repeat businesses rather than repeat-arbitrator or repeat-player bias"); *see also* Bingham, *supra* note 93, at 241; Colvin, *supra* note 93, at 417–18 (analyzing selection effects, costs, and availability of proceedings as variables that could affect outcomes of arbitration).

95. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., 9, 15 (2003).

96. *Id.*

97. *Id.*

98. *Id.*

99. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 5.6.12, at 56–57.

100. *Id.* at 57–58.

101. *Id.* at 57.

consumer repeat players, meaning the attorney appeared in four or more disputes filed in 2010, 2011, or 2012.[102] For student loan disputes, heavy repeat player-law firms represented 93% of consumers.[103] Cumulatively, repeat player attorneys represented consumers in 50% of filings across all product markets.[104] Not surprisingly, heavy company repeat players dominated arbitration filings for 2010–2011, constituting over 80% of filings.[105] While the high proportion of potential settlement outcomes effectively precludes drawing conclusions about the effectiveness of consumer repeat attorney representation in terms of "win rates;" the CFPB study found that disputes with a repeat corporate player against an unrepresented consumer was more likely to reach a merits decision than any other type of party pairing.[106] This information tells us that to the extent consumers are participating in arbitration, many of them are obtaining attorney representation by experienced law firms. Indeed, consumer-arbitration repeat filings appear to be a developing niche for consumer attorneys, even absent the class action.

Finally, the CFPB study tells us that dispute resolution is not a priority for consumer choice. Consumer prioritization about dispute resolution does not inform us as to its fairness, adequacy, or societal detriments, but it is a piece of the equation that cannot be overlooked. How important is the class action to the consumer? Apparently not much. The CFPB conducted a telephone survey in which it asked over 1,000 respondents about the factors that were important to them in selecting a credit card.[107] When asked an open-ended question, most respondents identified card rewards, interest rates, fees and application convenience.[108] Not surprisingly, no respondent raised dispute resolution.[109] When the telephone prompter described a hypothetical to the consumer in which a credit card company charged an improper fee and asked what he or she would do, most respondents commonsensically answered that he would cancel the card (57.2%).[110] Less than 2% mentioned seeking legal advice or suing with an attorney, but 10% stated they would refer the issue to a governmental

102. *Id.* at 58–59.
103. *Id.* at 60.
104. *Id.* at 60 fig. 15.
105. *Id.* at 59 fig. 14.
106. *Id.* at 65–66.
107. *Id.* § 3.4 at 10–11.
108. *Id.* § 3.4.1 at 15.
109. *Id.*
110. *Id.* § 3.4.2 at 16, 18.

agency.[111]

C. *The CFPB Study Provides No Basis for the Conclusion that Consumers Are Better Off Through Preservation of the Class Action.*

The above data suggest that this burgeoning arena of consumer arbitration, which has undergone significant developments and protections over the last two decades, has some promising developments for the consumer. But the CFPB study does not support the CFPB's conclusion that the class action must be preserved to protect the consumer. Instead, the study presents some disturbing data about the usefulness of the class action to the individual class member and as a societal good.[112] Approximately 60% of the consumer financial products class actions filed ended in a *non-class settlement* or *potential non-class settlement* (i.e., withdrawal or dismissal by the plaintiff).[113] Approximately 12% (69 cases) reached an approved class-action settlement.[114] This means that only a very small portion of class actions filed result in any damages to the class-member consumer. Yet those class actions filed do result in a societal drain on judicial resources, and corporate class action defense costs (which we would assume are passed on in one form or other to the consumer). Attorneys' fees awarded to counsel in class action settlements during the relevant time frame were $424 million, which is estimated at about 24% of total class payments and 16% of gross relief (proposed cash relief and in kind relief).[115]

Second, looking at a broader data set of consumer financial class-action settlements from 2008 to 2012, the average claims rate (claims made as a percentage of eligible class members) was low, 21%, with an 8% median.[116]

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111. *Id.* at 18.

112. The CFPB Arbitration Study analyzed 562 consumer financial products putative class cases filed between 2010–2012 and identified an outcome for 478 of those cases by the study date. *Id.* § 6 at 36. Of those, *none* went to trial on the merits. *Id* § 6 at 7. Ten were resolved against the company on motion, but only three (0.63%) of those were on a class-wide basis. *Id.* Additionally, of those ten resolved on the merits, seven were through default judgment. *Id.* § 6 at 37–38. It is also worth noting that in 94 of the 562 class actions studied, companies moved to compel arbitration; 46 of such motions were granted in full or in part. *Id.* § 6 at 8–9.

113. *Id.* § 6 at 40 fig. 11.

114. *Id.*

115. *Id.* § 8 at 33.

116. *Id.* § 8 at 5. Assessing claims rate is difficult and has some limitations as acknowledged in the CFPB Study. *Id.* § 8 at 30 n.49. Thus, the CFPB advises that these numbers should be viewed as a floor, because it may underestimate the actual rate. But the data reflects that consumers fail to capture much of the settlement relief offered. *See id.* (explaining how some litigants, even after obtaining a final order, do not file a settlement administrator report).

Thus, even when consumers obtain a settlement through the class device, they usually do not take the administrative steps to obtain the payout.

Finally, the CFPB study did not attempt to provide data on the average class member recovery for those sixty-nine cases that reached class settlement or the difficulty of obtaining settlement proceeds. One might assume, based on experience, that individual recovery is *de minimis* and oftentimes worthless, in the form of a coupon or as the Jimmy John's case above shows, a pickle. But even taking Director Cordray's slogan of an average of "about $220 million in payments to 6.8 million consumers per year in consumer financial services cases[,]"[117] one could estimate this results in about $32.35 in recovery to the individual per year, that is, if he or she takes the time to read and fill out the cumbersome forms required for claims-made recovery. If critics make the argument that most consumers will not take the time to read consumer arbitration rules or file a simple demand, the same argument cuts against class action recovery, which often comes on a multi-page court document notifying the class member of the proposed settlement and the effect of settlement (binding her claims if she does not opt out). This provides the class member with an unrealistic opportunity to object to the settlement in court and provides for more paperwork to claim some amount of reward. The CFPB is to be commended for including this class-action comparative data in its arbitration study, but the data does not support the conclusion that class actions are necessary to protect the individual consumer. Instead, the data suggests that some consumers may have a higher likelihood for a near-full recovery through individual arbitration. The CFPB's decision to exclude governmental financial entities, on the other hand, suggests that for consumers of government financial products, individual arbitration can be an appropriate alternative forum to the class action.[118] The only explanation the CFPB offers for the government exclusion is its belief that federal and state governments and their affiliates are "uniquely accountable through the democratic process to consumers."[119]

D. *Seeking Guidance from Other Dispute Resolution Systems: The European Union's Move in Favor of Consumer ADR*

One other reason we should be skeptical of the CFPB's proposed rule, which will effectively kill arbitration for consumer financial services

117. Cordray, Prepared Remarks, *supra* note 1.

118. Arbitration Agreements, *supra* note 2, at 32,925.

119. *Id.* at 32,881.

disputes, is that it is a step in the wrong direction when compared with the direction other countries are taking for consumer dispute resolution.[120] In 2013, the European Union (EU) issued the Directive on Alternative Dispute Resolution for Consumer Disputes, which took effect July 2015.[121] The Regulation on Online Dispute Resolution for Consumer Disputes took effect January 2016.[122] The rules require EU member states to ensure customer complaints "can be resolved online by nationally certified alternative dispute resolution entities."[123] The Directive does not make participation in alternative dispute resolution compulsory for merchants or consumers, but it does require all EU national governments to ensure the availability of an alternative dispute resolution entity for consumer claims that meets the procedural standards of the Directive.[124] The procedural requirements include an online dispute resolution process that is free or low-cost, impartial, transparent, fair, and legal (meaning that the dispute resolution provider will follow the law).[125] Additionally, the Directive requires that consumers agree to alternative dispute resolution after the dispute arises.[126]

Right away, some differences between EU consumer alternative dispute resolution and binding pre-dispute consumer arbitration in the United States emerge. But the Directive and implementing Regulation show the EU's movement towards low-cost and accessible dispute resolution for consumers. The Directive states as its purpose:

> Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts

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120. *See* Pablo Cortés, *The Brave New World of Consumer Redress in the European Union and the United Kingdom*, Disp. Resol. Mag., Spring 2016, at 41 (describing recent movements towards consumer ADR in Europe); Horst Eidenmüller & Martin Engel, *Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*, 29 OHIO ST. J. ON DISP. RESOL. 261, 275–77 (2014) (comparing consumer dispute resolution in the European Union, the United States, and Australia); Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 631 (2014) (discussing the growing trend towards reliance on online dispute resolution programs and noting that the CFPB Arbitration report shows that "[j]ustice is being denied to too many individuals when the amount in dispute is relatively low").

121. Council Directive 2013/11, 2013 O.J. (L 165) 63, 79 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:165:FULL&from=EN.

122. Council Regulation 524/2013, art. 22, 2013 O.J. (L 165) 1, 11 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:165:FULL&from=EN.

123. Cortés, *supra* note 120, at 41.

124. Council Directive 2013/11, para. 7, 2013 O.J. (L 165) 63, 64 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:165:FULL&from=EN.

125. *Id.* para. 10, 2013 O.J. at 63, 64; *see also* Cortés, *supra* note 120, at 41.

126. Cortés, *supra* note 120, at 41.

> should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as to offline transactions, and is particularly important when consumers shop across borders.[127]

The Regulation, in turn, requires the European Commission to run an online dispute resolution platform which will channel e-commerce complaints to the certified alternative dispute resolution entities.[128] My own prediction is that the next decade will see a marked increase in these online dispute resolution services that permit easy and efficient dispute resolution.[129]

Many justice systems are struggling with the same issue present in the United States. How do we provide meaningful redress for low-value claims given the increasing costs of public courts? In a new report to the Judiciary, Lord Justice Briggs recommended that the United Kingdom establish an online court system to provide access to justice for "ordinary individuals and small businesses."[130] In a way, the EU Directive and Regulations show us a model that we could work towards: efficient, simple, and low-cost dispute resolution with procedural safeguards for fairness, transparency, independence, and legality.[131]

V. WHAT TO DO WITH THE CFPB DATA FOR CONSUMER ARBITRATION GENERALLY?

Part of our panel's job was to address the issue of how the CFPB's study and proposed rule will affect consumer contracts generally. It is important to appreciate the CFPB study for what it is: a big step in the right direction

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127. Council Directive 2013/11, para. 10, 2013 O.J. (L 165) 63, 64 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:165:FULL&from=EN.

128. Council Regulation 524/2013, art. 2, 2013 O.J. (L 165) 1, 5 (EU), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:165:FULL&from=EN. In his article, *The Brave New World of Consumer Redress in the European Union and the United Kingdom*, Professor Pablo Cortés recounts several experiences in which he quickly and efficiently achieved consumer redress under the new EU alternative dispute resolution rules. Cortés, *supra* note 120, at 43.

129. For a discussion of emerging trends in online dispute resolution, see Shackelford & Raymond, *supra* note 120, at 627, which discusses recent trends in online dispute resolution development, including a private online dispute resolution provider, Modria, which New Orleans Parish has implemented for property tax assessment appeals). *See also About Us*, MODRIA http://modria.com/about-us/ (last visited Feb. 28, 2017). A quick google search will show that Modria's popularity has caught on like wildfire.

130. L. J. Briggs, JUDICIARY OF ENGLAND AND WALES, CIVIL COURT STRUCTURE REVIEW: FINAL REPORT, July 2016 at 28, https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf. *See also* Cortés, *supra* note 120, at 44.

131. *See e.g.* Resnick, *supra* note 14, at 2930–32 (discussing attributes of EU's move to consumer alternative dispute resolution/online dispute resolution and highlighting the favorable attributes of that system).

of arbitration transparency. One critical piece of information produced by the study is that consumers file only about 411 affirmative consumer financial products or services arbitration disputes annually.[132] While this constitutes nearly 70% of all consumer filings in this area,[133] it is still abysmally low. That means that any empirical study, even of AAA arbitrations, is going to have a limited data set. The question raised is why do consumers file so few claims? Is it due to fear of arbitration? Unfamiliarity? If so, law schools, legal aid clinics, and the CFPB itself can do much to educate the public about the potential benefits of arbitration and how to do it. The response may be that consumers just do not care enough to pursue these claims. But without significant efforts to educate and represent consumers by consumer support groups, it is too soon to fairly assess consumer arbitration, particularly given what we know about the class action. However, other implications of the study are useful in application to consumer arbitration outside the financial products arena. Consumers are getting attorney representation about 50% of the time.[134] Those attorneys tend to have some level of repeat-player knowledge with arbitration.[135] And consumer cases tend to settle.[136] This signals that the consumer is getting some relief. Still, we need more information from all providers, not just the AAA, and we need regulation. For the consumer arbitration model to work, even theoretically, businesses have to be willing to trade the class device for free and fair arbitration that is transparent. Thus, federal agencies like the CFPB could engage in regulatory work by (1) requiring that business pay 100% of arbitration costs; (2) providing an incentivizing clause resulting in a windfall to the consumer (and consumer attorney) if the company fails to settle and the consumer wins a great amount; (3) prohibiting confidentiality clauses so that consumer attorneys can work together to pursue discovery or expert witnesses, even if they cannot assert joint claims; (4) requiring greater transparency through detailed data reporting by the arbitration provider and business on claims and outcomes; (5) broadening the scope of appellate review; and (6) requiring a written statement of decision to assess arbitrator expertise and engagement of the law. The CFPB paradoxically elected to do none of these things, instead choosing to effectively "kill" consumer arbitration by elevating the usefulness of class action above the results shown by its own

132. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 14, § 1.4.3, at 11.

133. *Id.*

134. *Id.* § 5.2.1 at 10.

135. *Id.* § 1.4.3 at 12.

136. *Id.* § 6.6.2 at 48.

study. But there is no reason the FTC or Congress should follow this course with other consumer products or services, unless we have more data proving that consumers simply will not bring arbitration claims.[137]

Perhaps the most important struggle with permitting mandatory pre-dispute consumer arbitration to continue evolving is Professor Sternlight's argument that consumers simply will not bring claims. Some claims are either too difficult to discover, or too difficult to prove without a team of attorneys or protracted discovery.[138] This is undoubtedly true for some claims, although it would be difficult to estimate how much. It is also undoubtedly true that many class claims are not worth the societal costs (evidenced by the 60% failure rate among those that do not result in class settlement). One solution is to rely on public enforcement. The CFPB has breathed new life into the tools of the federal agency avenger, negotiating numerous settlements or fines with consumer financial services companies.[139] The FTC could equally rise to the consumer protection task, as can state attorneys general. Indeed, those government officials tasked with consumer protection are likely in a better place to prioritize overall consumer injustices than plaintiffs' class action attorneys. Peter Linzer, the moderator, concluded our discussion with the observation that the CFPB study does not show that class actions are a good solution, but it might be the best solution we have compared to consumer arbitration. Respectfully, I disagree. With consumer education and a willingness of a new wave of attorneys to engage in repeat consumer arbitration filing, consumer arbitration has the potential to prove a fruitful new arena for free and

137. In October 2016, the Centers for Medicare and Medicaid Services (CMS) drastically changed its proposed rule governing nursing home pre-dispute arbitration agreements by precluding pre-dispute arbitration agreements with prospective residents. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,690 (Oct. 4, 2016) (to be codified at 42 C.F.R. pt. 483). This final rule is a stark departure from the proposed rule, which would have permitted pre-dispute nursing home arbitration agreements with certain contractual and procedural safeguards. Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42264 (proposed July 16, 2015). The American Health Care Association and other plaintiffs have already filed a lawsuit contesting CMS's authority to promulgate the pre-dispute arbitration ban and claiming that it violates the FAA. Complaint, Am. Family Health Care Assoc. v. Burwell, Civ. Act. No. 3:2016cv00233, (N.D. Miss. Oct. 17, 2016).

138. Sternlight, *supra* note 88, at 114.

139. One need look no further than the $185 million fine, including $100 million penalty, the CFPB assessed against Wells Fargo for fraudulently opening consumer accounts. *See* Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), http://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html?_r=0. The fall-out from this penalty and scandal ultimately caused the CEO to resign. Emily Glazer, *Wells Fargo CEO John Stumpf Steps Down*, WALL ST. J. (Oct. 12, 2016), http://www.wsj.com/articles/wells-fargo-ceo-stumpf-to-retire-1476306019.

individual consumer recovery, run much like a private administrative law court. But the process is still early, and there are many regulatory measures appropriately called for that stop short of banning arbitration outright.