



U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
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December 11, 2013

Consumer Financial Protection Bureau
Attention: Ms. Monica Jackson
1700 G Street NW
Washington, DC 20552

Re: *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Docket No. CFPB-2012-0017—Supplemental Submission

Dear Ms. Jackson:

This letter and its appendix are submitted on behalf of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness (“CCMC”) and the U.S. Chamber Institute for Legal Reform (“ILR”). The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. ILR is an affiliate of the Chamber dedicated to making our nation’s overall civil legal system simpler, faster, and fair for all participants.

We write regarding the Consumer Financial Protection Bureau’s (“Bureau”) study, authorized by Section 1028(a) of the Dodd-Frank Act and now underway, concerning pre-dispute arbitration agreements in consumer financial contracts. Congress provided that the Bureau must conduct a study of pre-dispute arbitration agreements as a prerequisite to any proposed regulation. Specifically, any “prohibit[ion] or impos[ition of] conditions or limitations” on arbitration must be supported by a finding “that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule *shall be consistent with the study* conducted under subsection (a).”¹ Stated

¹ 12 U.S.C. § 5518(b) (emphasis added).

another way, the Bureau cannot regulate arbitration without conducting an appropriate study, and any proposed regulations must be based on and supported by that study.

Arbitration is an important means of resolving disputes that provides extremely significant benefits to consumers and businesses. As we have previously explained in comments submitted to the Bureau,² arbitration of consumer disputes has been common practice for decades; there are perhaps hundreds of millions of consumer contracts currently in force that include arbitration agreements—many of them relating to consumer financial products or services.

The Bureau initially requested comment on how it should conduct the study. A number of commenters—including CCMC and ILR—suggested topics that should be addressed in the study and, in addition, urged the Bureau to issue a public notice identifying the topics that it had decided to study and requesting public comment regarding those topics.³

Unfortunately, the Bureau has done neither—***it has not informed the public of the topics it is studying and it has not solicited information regarding those topics.*** As a result, interested individuals and organizations have had no real opportunity to inform the Bureau of available evidence bearing on the issues the Bureau has decided to study, or to develop additional empirical data relevant to those issues. That failure to enable the public to comment on the subjects of the Bureau's study introduces a critical flaw in the study—and, therefore, will completely undermine any rulemaking that may be undertaken on the basis of the study's findings.⁴

² Letter from David Hirschmann & Lisa Rickard to Matthew Burton & PRA Office, Re: "Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements," Docket No. CFPB-2013-0016 (Aug. 6, 2013), <http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0016-0015> (*Chamber Comment II*); Letter from David Hirschmann & Lisa Rickard to Monica Jackson, Re: *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Docket No. CFPB-2012-0017 (June 12, 2012), available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0051> (*Chamber Comment I*).

³ *Chamber Comment I* at 3-5, 10-20.

⁴ The Bureau has sought one round of comments regarding a proposed consumer survey of "awareness of dispute resolution provisions in their agreements with credit card providers"—and promised the opportunity for a second round of comments—but only because the Paperwork Reduction Act required it to take that step. *Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements*, Docket No. CFPB-2013-

In order to try to ameliorate these deep flaws in the Bureau's study plan, ILR and CCMC submit the information in this letter and its attachment, which are designed to help the Bureau assess the relative benefits and costs of different dispute resolution systems. This information makes clear that ***arbitration before a fair, neutral decision maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.***

This submission by ILR and CCMC is designed to address empirical issues that *should* be at the center of the Bureau's study. Given the near-total absence of information from the Bureau about its study design, however, it is impossible for interested parties to offer information tailored appropriately to the topics the Bureau is studying. In any event, the information we are providing is highly relevant to *any* rational study of the relevant issues.⁵

We focus on several fundamental points:

- Arbitration enables consumers with grievances to obtain redress for the vast majority of disputes they are likely to have—small, individualized claims for which litigation in court is impractical. This access to an inexpensive and simple system of dispute resolution is an extremely significant benefit that is often overlooked entirely in the debate over arbitration.
- For typical consumer disputes that are small and individualized, consumers are highly unlikely to be able to hire an attorney to help navigate the court system.

0016, 78 Fed. Reg. 34352 (June 7, 2013). It is disappointing that the Bureau has devoted such attention to soliciting comment on what presumably is a minor component of the overall study. Indeed, as ILR and CCMC explained in their comment, the consumer survey will not produce any information useful to the study specified by Congress. *See Chamber Comment II* at 11-21.

⁵ We again respectfully urge the Bureau to provide the public with at least some transparency regarding its study plan in order to enable interested parties to provide relevant information and prevent the Bureau from producing a study that is fatally flawed because it was produced in an informational vacuum. Soliciting public input would surely benefit the Bureau's work: Although the Bureau possesses or can retain able staff and consultants, there is a great deal of information regarding both judicial litigation and arbitration that either has been developed or (more likely) could be developed that is highly relevant to the Bureau's statutory mandate. A legitimate study process would welcome—and facilitate—the submission of such information.

- Those consumers who do brave the courts find that a hearing on their claims is long delayed by overcrowded dockets in our underfunded courts.
- Arbitration is at least as likely, and often more likely, than litigation in court to result in positive outcomes for consumers, as empirical studies repeatedly have shown.
- Arbitration is more user-friendly and inexpensive than litigating in court—especially when (as is increasingly common) parties agree to include fee-shifting or cost-shifting provisions in their arbitration agreements.
- In addition, arbitration agreements offer fair and simplified procedures for consumers—something that is ensured by the protections of generally-applicable state unconscionability law as well as the due process safeguards of the nation’s leading arbitration providers, including the American Arbitration Association and JAMS.
- The arguments advanced by critics of arbitration do not stand up to careful scrutiny.
- Some say that, while they recognize the benefits of arbitration, they believe that parties would be better served if they were precluded from committing to arbitration until after a dispute arises. But permitting only “post-dispute arbitration agreements” is an illusory option that actually would have the effect of eliminating arbitration. As scholars have recognized, without arbitration agreements that commit both sides to a potential dispute to arbitrate *before the dispute arises*, arbitration agreements in fact will be rare indeed—and the result will be that consumers are relegated to the judicial system in precisely those cases where burdensome court procedures and overcrowded courts are likely to stymie their claims.
- Class action proponents decry the fact that arbitration typically takes place on an individual basis. But their defense of class actions rests on purely theoretical arguments about the supposed virtues of that procedural device. In reality, consumer class actions deliver (at best) minimal benefits to most consumers.

- A new empirical assessment of class actions that the Chamber has commissioned demonstrates that the class actions studied provide little or no benefit to consumers.
- None of the class actions studied resulted in a trial or in a judgment for plaintiffs on the merits.
- The overwhelming majority of cases are dismissed voluntarily by the named plaintiffs—either because they decide not to proceed with the case or because they settle out on an individual basis—or are dismissed by courts because they are not legally sustainable. Either way, the result is that class members do not benefit.
- And the remaining minority of class actions that are settled on a class-wide basis usually provide class members with little, if any, tangible benefit. As a result, only a handful of class members—often fewer than 10 percent, and sometimes less than 1 percent—even bother to submit claims for benefits.
- Consumers can pursue their claims without the class action device. As even the dissenting Justices in the Supreme Court’s recent decision in *American Express Co. v. Italian Colors Restaurant* expressly recognized, “non-class options abound” for effectively pursuing claims on an individual basis. In particular, many arbitration agreements require businesses to pay all or most of arbitration filing fees, authorize the payment of attorneys’ fees and other costs of proof in meritorious cases, and provide incentives for individuals to bring claims. And other, more informal, methods of obtaining economies of scale exist, including the use by multiple claimants of the same attorneys and expert witnesses, where necessary.
- The claim that class procedures should be mandated because class actions provide benefits to consumers therefore is not supported by the reality of class actions outcomes. And, because requiring class procedures would result in the elimination of arbitration—companies would not be willing to absorb the additional costs of arbitration *and* the huge legal fees associated with defending class actions—consumers would lose the ability to pursue the myriad

individualized claims that are not practicable to litigate in court. Indeed, the only beneficiaries of such a requirement would be lawyers—both plaintiff’s lawyers and defense lawyers—who are the only clear winners in class action litigation.

- In short, any rational assessment of the benefits and costs of arbitration must conclude that prohibiting or regulating arbitration will harm consumers much more than it would benefit them.

I. Arbitration Benefits Consumers By Providing A Fair Means Of Resolving Disputes That Consumers Cannot Practically Litigate In Court.

Arbitration enables consumers, employees, and others with grievances to obtain redress for a large number of claims for which litigation in court is impractical. Arbitration is quicker and less costly, and it is at least as likely to result in positive outcomes for claimants. Indeed, the empirical evidence demonstrates that individuals in arbitration fare *at least as well as—if not better than*—they would have in court. *Arbitration thus benefits consumers by providing a fair means of adjudicating claims that would be left without redress in the absence of arbitration.*

A. The Judicial System Is Not A Realistic Means Of Obtaining Redress For Most Injured Consumers.

If the judicial system were free of transaction costs, if every legitimate claimant could obtain legal representation, and if lawsuits were resolved expeditiously, then perhaps the courts could be relied upon as the exclusive means of redress for injured consumers. In fact, of course, today’s judicial system falls far short of that ideal; each of these three prerequisites is absent, and the reality of judicial litigation is getting significantly worse each year.

Recourse to the judicial system therefore simply is not a realistic option for most injured consumers. Most claims are individualized and too small to attract the legal representation needed to navigate the complex legal system; costs of litigating are too great; and the courts—even many small claims courts—impose requirements (such as appearing in person during the working day) that make litigating there

burdensome and costly. All of these costs are multiplied by the myriad inefficiencies of the judicial system, including time-consuming procedures, delays and postponements in court appearances, and the like.

1. **The Vast Majority of Consumer Claims Cannot as a Practical Matter be Pursued in Court.**

Litigation in court is complicated and expensive—non-lawyers need legal representation to have any hope of successfully navigating the judicial system. And even with a lawyer, claims are difficult and time-consuming to litigate.

Most wrongs suffered by consumers are relatively small and individualized—excess charges on a bill, a defective piece of merchandise claim, and the like. These claims are simply too small to justify paying a lawyer to handle the matter and in any event most consumers do not have the resources to do so.

As Justice Breyer has recognized, without arbitration, “the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)” would be left “without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.”⁶ Thus, for the largest category of injuries suffered by consumers, the choice is “arbitration—or nothing.”⁷

In the employment context, for instance, it has been estimated that the potential recovery is too small in 72% of the cases currently resolved using pre-dispute arbitration⁸ and in 95% of all potential claims⁹ to justify litigation in court and

⁶ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

⁷ Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008) (discussing analogous situation of employees with low-dollar claims).

⁸ Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel?*, 74 Alb. L. Rev. 769, 785 (2010/2011); accord, Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 318 (2003); accord Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol. J. 32, 37 (2012).

⁹ St. Antoine, 41 U. Mich. J.L. Reform at 790.

the retention of counsel. There is no reason to believe that the universe of consumer claims differs.¹⁰

Such claims do not—and could not—attract lawyers willing to work on a contingency-fee basis. Research demonstrates that lawyers accept contingent-fee cases only if the claim promises both a substantial recovery and a substantial percentage of that recovery as a legal fee. One study reported that a claim must be worth at least \$60,000 before a lawyer will consider taking it.¹¹ In some legal markets, this threshold may be as high as \$200,000.¹² The vast majority of consumer claims are so small that they will “not . . . elicit a lawyer’s attention.”¹³

But the complexities of judicial litigation make it difficult, if not impossible, for most individuals to represent themselves effectively in court. The rules are opaque to non-lawyers, and navigating these obstacles can therefore be burdensome to individuals. The requirement of in-person appearances during the workday compounds the economic burden.

Small-claims courts were developed to make it easier for individuals to proceed without representation, but they do not provide a realistic alternative because state budget cuts have severely hobbled these courts. For example, the *New York Times* reported in 2011 that in New York, night court sessions were being cancelled in many locales, waits had quadrupled, and court officials were unable to work through their overburdened daily dockets, forcing individuals to leave empty-handed, only to return another day in the hope that their disputes will eventually be heard.¹⁴

¹⁰ See, e.g., Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 898 (2010) (noting that “the number of consumers bringing large claims” in consumer arbitration “is small”).

¹¹ Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003).

¹² Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force 10 (Nov. 23, 2011), <http://www.mnbar.org/sections/outstate-practice/11-23-11%20Civil%20Justice%20Reform.pdf>.

¹³ *Id.*

¹⁴ See William Glaberson, *Despite Cutbacks, Night Court’s Small Dramas Go On*, N.Y. TIMES, June 2, 2011, [available at http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-new-york-small-claims-courts-trudge-on.html](http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-new-york-small-claims-courts-trudge-on.html).

Similarly, cases filed in San Joaquin County, California’s small-claims court in September 2012 had still not been *scheduled* for trials as of May 2013.¹⁵ The court’s presiding judge explained: “In our county, if you file a small claims case it simply sits in the proverbial box waiting to get a trial date. Your case sits and goes nowhere. It’s not right, but you have to have sufficient resources to get those cases done, and we don’t have those resources.”¹⁶ Meanwhile, a Texas law that went into effect in August 2013 “abolish[ed] small claims courts across the state, meaning all those small-price-tag cases—seeking no more than \$10,000—[would now] be handled by justice of the peace courts, some of which already are buried under dockets teeming with minor civil matters.”¹⁷

2. Even for Larger Claims, the Court System Provides Significant Delays and High Costs.

Some claims are large enough to support contingency fees that would attract the interest of lawyers. But the complexity of the litigation system makes litigation costly and—as a result of budget cuts—many courts are simply unable to keep up with their caseloads, leading to extreme delays. Filing fees also have increased, placing further burdens on plaintiffs.

Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association’s “Task Force on the Preservation of the Justice System,” which was co-chaired by David Boies and Theodore B. Olson.¹⁸ The President of the ABA stated that “all over this country,” state “[c]hief justices are

¹⁵ Emily Green, *Budget Woes Mean Big Delays For Small Claims Courts*, Nat. Pub. Radio, May 15, 2013, available at <http://www.npr.org/2013/05/17/182640434/budget-woes-mean-big-delays-for-small-claims-courts>.

¹⁶ *Id.*

¹⁷ Kiah Collier, *Little-known state law doing away with small claims courts*, Houston Chronicle, June 23, 2013, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Little-known-state-law-doing-away-with-small-4616571.php>; see also *Adoption of Rules for Justice Court Cases*, Misc. Docket No. 13-9023 (Tex. Feb. 12, 2013), <http://supreme.courts.state.tx.us/MiscDocket/13/13902300.pdf>.

¹⁸ Am. Bar. Ass’n (“ABA”), *The Growing Crisis of Underfunding State Courts*, Mar. 16, 2011 (“ABA Report”); see also G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786, 787 (2011-2012).

closing the courts one day a week” and “court personnel including judges [are] being furloughed without pay.”¹⁹

These funding problems have continued. Due to “los[ing] about 65% of their general fund support from the state during the last five years,” California’s court system is subject to even more lengthy delays.²⁰ As the state’s Chief Justice noted in calling on the California Legislature to increase funding to the state judiciary, “[t]he cruel irony is that the economic forces that have led to budget reductions to the courts are the same ones that drive more of our residents to court.”²¹ And the San Diego County Bar Association warned that “local courts—long the shining example statewide of judicial efficiency—have now been hobbled to such an extent that extensive delays, the closure of courtrooms, the unavailability of essential court services, and long wait times now characterize those court systems instead.”²² These dramatic cutbacks have made it impossible for many courts to keep up with their caseload, leading to extended delays that leave “litigants with no expectation of relief or resolution of their cases for extended periods of time.”²³

As the *Los Angeles Times* reported, “[a]t least 53 courthouses have closed,” and “[c]ourts in 20 counties are closed for at least one day a month.” These and other “court closures have forced some San Bernardino [county] residents to drive up to 175 miles one way to attend to a legal matter.”²⁴ In New York City, similarly, the wait for a court date is now four times as long as it was before recent budget cuts.²⁵

¹⁹ Wm. T. (Bill) Robinson, *ABA President Robinson Explains Nationwide Crisis in Dwindling Court Budgets*, Aug. 4, 2011 (video).

²⁰ Maura Dolan, *Budget cuts force California courts to delay trials, ax services*, L.A. Times, Apr. 9, 2013, <http://articles.latimes.com/2013/apr/09/local/la-me-court-cutbacks-20130410>.

²¹ Erin Coe, *California Justice Warns of Looming Case Delays*, Law360, Mar. 9, 2012, available at <http://www.law360.com/legalindustry/articles/319086>.

²² San Diego County Bar Association, *2013 State of the Judiciary in San Diego County*, https://www.sdcbba.org/temp/ts_DAFFCDF9-BDB9-505B-DB71DEEC48C1B816DAFFCE09-BDB9-505B-DF72E0368E012958/CFAC%20Annual%20Report-6-7-2013%5BRS%5D.pdf.

²³ Maura Dolan & Victoria Kim, *Budget cuts to worsen California court delays, officials say*, L.A. Times, July 20, 2011 (quoting Los Angeles County Superior Court Presiding Judge Lee Smalley Edmon), <http://articles.latimes.com/2011/jul/20/local/la-me-0720-court-cuts-20110720>.

²⁴ Dolan, *supra* note 20.

²⁵ See Glaberson, *supra* note 14; see also Jennifer Golson, *Budget Cuts have 'Widespread' Impact on NY State Courts-Report*, Reuters, Aug. 16, 2011 (quoting Michael Miller of the New York County Lawyers' Association).

Budget cuts led to “shortened hours” in the New York City courts that are a “hardship” for litigants—especially the “economically distressed and working poor people” who face “less flexibility in getting to the court.”²⁶

In New Hampshire, all civil trials were delayed by a full year to “satisfy speedy trial concerns in criminal proceedings.”²⁷ And the presiding judge of the San Francisco County Superior Court announced: “The civil justice system in San Francisco is collapsing. We will prioritize criminal, juvenile and other matters that must, by law, be adjudicated within time limits. Beyond that, justice will be neither swift nor accessible.”²⁸ Indeed, even before recent budget cuts, the situation could be bleak for litigants. In 2003, for example, caseloads in Minnesota were so heavy that “judges had on average only 120 seconds of court time to spend on each case.”²⁹

Although the vast majority of civil claims are filed in state courts,³⁰ the federal courts also have extraordinarily high caseloads, especially at the trial-court level, where the backlogs are particularly severe.³¹ The Brennan Center for Justice has found that

²⁶ *At a Standstill: Budget Cuts Have Brought New York’s Court System to a Crawl*, NYPress.com, Dec. 5, 2012, <http://nypress.com/at-a-standstill-budget-cuts-have-brought-new-yorks-court-system-to-a-crawl/>.

²⁷ ABA Report, *supra* note 18; see also Karen Weise, *U.S. Courts Face Backlogs and Layoffs*, Bloomberg Businessweek, Apr. 28, 2011, http://www.businessweek.com/magazine/content/11_19/b4227024878939.htm.

²⁸ See Dan Rivoli, *California Trial Court To Lay Off 200, Close 25 Rooms*, Law360.com, July 18, 2011 (quoting San Francisco County Superior Court Judge Katherine Feinstein), <http://www.law360.com/legalindustry/articles/258746/calif-trial-court-to-lay-off-200-close-25-rooms>.

²⁹ Constitution Project, *The Cost of Justice: Budgetary Threats to America’s Courts* 6, 2006, <http://www.constitutionproject.org/wp-content/uploads/2012/10/36.pdf> (citing Minn. Sup. Ct. Chief Justice Kathleen A. Blatz, *2003 State of the Judiciary*, Minn. State Bar Ass’n Annual Convention, June 20, 2003).

³⁰ State courts reported around 19 million new civil cases filed in 2010, while federal courts reported over 280,000 new civil cases filed that same year. Compare National Center for State Courts, Court Statistics Project, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* 3, Dec. 2012, http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (state courts in 2010), with Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts 2012*, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx> (federal courts in 2010).

³¹ Ruben Castillo, the Chief Judge of the Northern District of Illinois, said that budget constraints have created “a crisis” for U.S. district courts, and that he is essentially being asked: “Which limb do you want amputated?” Michael Tarm, *New Hispanic Chief Judge: Need More Jury Diversity*, Associated Press, July 2, 2013; see also Michelle R. Smith & Jesse J. Holland, *Budget cuts cause delays, concern in federal court*, Associated Press, April 25, 2013, <http://bigstory.ap.org/article/budget-cuts-cause-delays-concern-federal-court> (“Federal budget cuts have caused delays in at least one terror-related court case in New York and prompted a federal judge in Nebraska to say he is ‘seriously contemplating’ dismissing some criminal cases.”).

“the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007. A judge in 1992 had an average of 388 pending cases on his or her docket. By 2012, the average caseload had jumped to 464 cases—a 20 percent increase.”³²

A recent report by the New York County Lawyers’ Association noted that the two federal district courts covering New York City, the Southern and Eastern Districts of New York, “and other federal courts were hit with a 10% funding allocation below the Fiscal Year 2012 level.”³³ Those constraints led to reductions in a wide range of court services, including staffing furloughs, “curtail[ing] [courts’] hours of operation,” and “slower processing of civil and bankruptcy cases.”³⁴ Similarly, as a federal district judge in Massachusetts explained, “[n]ext year, with additional sequester cuts, I predict (but I’m not positive) that we will run out of money for civil juries before the end of the fiscal year. July, August, I’m not sure when but we will run out.”³⁵ And just this year, the federal district court of the Central District of California “announced it [would] severely curtail services at its three courthouses on seven Fridays from April through [August 2013], accepting only mandatory and emergency filings.”³⁶

These delays can have serious consequences for plaintiffs. A lawyer in Washington state explained, for example, that his civil case was postponed for more than two years because criminal cases—which are subject to constitutional and statutory speedy-trial requirements—had priority. “During that period of time, the

³² Alicia Bannon, *Federal Judicial Vacancies: The Trial Courts* 5, Brennan Ctr. for Justice, 2013, <http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts>.

³³ New York County Lawyers’ Association, *Report on the Continuing Effect of Judicial Budget Cuts on The U.S. District Courts for the Southern and Eastern Districts of New York* 3, Sept. 4, 2013, http://www.nycla.org/siteFiles/Publications/Publications1637_0.pdf.

³⁴ *Id.* at 11.

³⁵ Andrew Cohen, *How the Sequester is Holding Up Our Legal System*, The Atlantic, July 12, 2013, <http://www.theatlantic.com/national/archive/2013/07/how-the-sequester-is-holding-up-our-legal-system/277704/>.

³⁶ *Budget Cuts Start to Hurt Courts*, The BLT: The Blog of Legal Times, Mar. 29, 2013, <http://legaltimes.typepad.com/blt/2013/03/budget-cuts-start-to-hurt-courts.html>; see also *Amended Notice Re Reduced Service Days*, Central District of California, August 2013, <http://www.cacd.uscourts.gov/news/amended-notice-re-reduced-service-days>.

defendant corporation ceased doing business and became insolvent; all assets were distributed to others and the judgment which was obtained became worthless.”³⁷

Budget cuts have also forced courts to supplement their revenue by increasing fees. The Chief Justice of the Minnesota Supreme Court explained: “[A]s part of the effort to close the revenue gap, significantly increased fees were imposed on a wide variety of cases. As a result, it is going to cost more to go to court and to practice law in Minnesota. This is not what we wanted[.]”³⁸

Simply put, the situation for litigants in the underfunded and understaffed courts is grim; and because the trend is toward more cutbacks, the situation will likely get worse.

B. Arbitration Provides A Fair And Effective Remedy For The Injured Consumers For Whom The Judicial System Is Not A Realistic Option.

Arbitration has a number of advantages over pursuing litigation in our overburdened court system. To begin with, arbitration offers flexible proceedings at lower cost. And arbitration proceedings are resolved more quickly than proceedings in court.

As we explain below, studies show that consumers who use this efficient dispute-resolution system prevail in arbitration at least as frequently as—and often more frequently than—they do in court. A wealth of scholarship comparing outcomes of consumers’ and employees’ claims in arbitration and in litigation reveals that arbitration provides a realistic and fair opportunity for individuals to seek justice before a neutral decisionmaker. “[F]rom the individual’s perspective, arbitration” has

³⁷ Constitution Project, *supra* note 29, at 8 (citing Washington Courts, Bd. for Judicial Admin., Court Funding Task Force, *Justice in Jeopardy: The Court Funding Crisis in Washington State* 36, 2004, http://www.courts.wa.gov/programs_orgs/pos_bja/wgFinal/wgFinal.pdf).

³⁸ Chief Justice Eric Magnuson, *The State of the Judiciary: 2009 – Building a 21st Century Judiciary*, Bench&Bar of Minn., Aug. 1, 2009, <http://mnbenchbar.com/2009/08/the-state-of-the-judiciary-building-a-21st-century-judiciary/>.

the distinct advantage of “provid[ing] an affordable forum with superior chances for obtaining a favorable result.”³⁹

Existing law, moreover, ensures the fairness and neutrality of arbitration proceedings. The Federal Arbitration Act allows states to regulate arbitration agreements under generally applicable state-law contract principles, including unconscionability. To that end, courts regularly refuse to enforce the small minority of arbitration agreements containing what they consider to be unfair provisions—such as limitations on damages that would be available to individuals in court, inconvenient forum-selection rules, biased arbitrator-selection procedures, or prohibitively expensive costs of accessing an arbitral forum.

In addition to courts’ oversight of arbitration provisions, the market has supplied arbitration procedures that are fair to all participants. The leading arbitration providers—such as the AAA and JAMS—have implemented rules and policies tailored for the resolution of consumers’ and employees’ disputes, which provide basic requirements of procedural fairness that provide strong protections for consumers and employers. And after the Supreme Court emphasized the fairness of the arbitration provision at issue in *AT&T Mobility v. Concepcion*,⁴⁰ many businesses have adopted similar pro-consumer provisions.

1. Arbitration’s Flexibility and Lower Cost Makes it Much More Accessible than Courts.

Arbitration is much more user-friendly and inexpensive than litigating in court. “The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”⁴¹

³⁹ Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 *Cardozo J. Conflict Resol.* 267, 279 (2008)

⁴⁰ 131 S. Ct. 1740 (2011).

⁴¹ *Allied-Bruce Terminix*, 513 U.S. at 280 (quoting H.R. Rep. No.97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777); *see also, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

Under the consumer procedures of the American Arbitration Association, for example, consumers cannot be asked to pay more than \$200 in total arbitration costs; businesses shoulder all remaining fees.⁴² By comparison, the cost of filing a civil suit in a federal district court has recently risen to \$400 or more.⁴³

It is no wonder that Justice Ruth Bader Ginsburg has described the AAA's and other providers' consumer arbitration fee structures as "models for fair cost and fee allocation."⁴⁴ And studies have long found that in practice, a large percentage of individuals who bring claims in arbitration pay exactly nothing to pursue their claim—no filing fees, no attorney fees.⁴⁵

The costs of presenting a claim in arbitration, moreover, typically are far lower than litigating in court. Indeed, arbitration does not require a personal appearance to secure a judgment; claims can be adjudicated on the papers or on the basis of a telephone conference.⁴⁶ Plaintiffs can submit the relevant documents and a common-sense statement of why they are entitled to relief, and can do so without a lawyer. There is no need to wait in line at night court or miss work, only to be forced to return another day if the court is unable to get through its docket.

Moreover, plaintiffs with more complicated claims may retain an attorney to assist them in presenting their case—but the cost is less because of the more informal nature of arbitration procedures. In addition, parties can (and often do) agree to include fee-shifting provisions in their arbitration agreements that make it less expensive to resolve disputes in arbitration. Consider the arbitration provision that

⁴² Am. Arb. Ass'n ("AAA"), *Costs of Arbitration (Including AAA Administrative Fees)* 1, March 1, 2013, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased.

⁴³ Judicial Conference of the United States, *District Courts Miscellaneous Fee Schedule* (approving a \$50 "administrative" filing fee on top of the previous \$350 filing fee), available at <http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx>.

⁴⁴ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., concurring in part).

⁴⁵ Hill, 18 Ohio St. J. on Disp. Resol. at 802 (lower-income employees "paid no forum fees" in 61% of the cases studied; employees also paid no attorneys' fees in 32% of the cases).

⁴⁶ AAA, *Consumer Related Disputes Supplementary Procedures* 6, Mar. 1, 2013, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased.

the Supreme Court approved in *Concepcion*. As the Court then explained, the Concepcions' claim was "most unlikely to go unresolved" because the arbitration provision at issue provided that AT&T would pay the Concepcions a minimum of \$7,500 and twice their attorneys fees if they obtained an arbitration award "greater than AT&T's last settlement offer."⁴⁷

Finally, in contrast to the extreme delays that are typical of our overburdened state and federal courts, consumer arbitrations administered by the American Arbitration Association are typically resolved in four to six months—a huge improvement over the 25.7 months that pass before the average civil lawsuit in federal court first reaches trial (in those rare cases that make it to trial).⁴⁸ (Even in 2001—well before the recent rounds of cutbacks—a contract suit tried before a jury took 25 months on average to reach judgment; but now that time frame won't suffice even to begin a trial.⁴⁹) Long delays are a sure-fire way of increasing the transaction costs of dispute resolution.

In short, arbitration gives consumers a practical and accessible way to pursue their disputes far more often than litigating in court would.

⁴⁷ *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011) (noting that "aggrieved customers who filed claims would be 'essentially guarantee[d] to be made whole," and that "the District Court 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") (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009)).

⁴⁸ AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, 2007, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 ("AAA Caseload Analysis"); see also David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572-73 (2005) ("few dispute the assertion that arbitration is faster than litigation"); U.S. District Court—Judicial Caseload Profile (2012), <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>. See also, e.g., Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004); reporting findings that arbitration was 33% faster than analogous litigation); see also 23-9 Insurance Times, Apr. 29, 2003, http://www.insurancejournal.com/pdf/InsuranceTimes_20030429_39125.pdf; GAO Report to Congressional Requesters, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards* 32 (June 2000), <http://www.gao.gov/archive/2000/gg00115.pdf> (reporting that the few securities claims to reach a judgment in court took 1,151 days—or over 3 years—on average); FINRA, *Dispute Resolution Statistics, Summary Arbitration Statistics October 2013* <http://www.finra.org/arbitrationandmediation/finradisputeresolution/additionalresources/statistics/> ("FINRA Statistics") (arbitration claims closed in 2013 through October were pending only 14.2 months on average).

⁴⁹ Bureau of Justice Statistics, *Contract Trials and Verdicts in Large Counties, 2001* 2, Jan. 2005, <http://www.bjs.gov/content/pub/pdf/ctvlc01.pdf>.

Finally, arbitration is also attractive “from the company’s perspective” because it provides a process that is, on average, cheaper than litigation—resolving most consumer or employment complaints quickly and efficiently, to the consumers’ or employees’ satisfaction—while minimizing unnecessary transaction costs of in-court litigation.⁵⁰

2. Consumers Prevail in Arbitration at Least as Frequently As—and Often More Frequently Than—they Do in Court.

The empirical research reveals that claimants who choose to arbitrate their claims against businesses are at least as likely—if not more likely—to prevail than those who proceed in court.

Data on win rates reveal that consumers and employees obtain relief to their satisfaction in a significant proportion of arbitrations.

- A recent study by scholars Christopher Drahozal and Samantha Zyontz of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time.⁵¹
 - Empirical studies that have sampled wide ranges of claims have similarly reported that plaintiffs win in state and federal court approximately 50% of the time.⁵²
 - Drahozal and Zyontz also found that “[c]onsumer claimants who bring large claims tend to do better than consumers who bring smaller claims,” but that “[i]n both types of cases, the consumer claimant won some relief against the business more than half of the time.”⁵³

⁵⁰ Maltby, 30 Wm. Mitchell L. Rev. at 317.

⁵¹ Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 896-904.

⁵² See, e.g., Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

⁵³ Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898.

- Prevailing consumer claimants were generally awarded between 42% and 73% of the amount that they claimed—depending on whether they presented a large or small claim and on how the statistics were calculated (mean or median recovery).
- Claimants are able to win not only compensatory damages but also “other types of damages, including attorneys’ fees, punitive damages, and interest.”⁵⁴ In particular, 63.1% of prevailing claimants who sought attorneys’ fees were awarded them.⁵⁵
- Moreover, although the study’s authors found a higher win rate (83.6%) for businesses that bring claims against consumers, they concluded that this result was attributed to the fact that “businesses tend to bring debt collection actions and other similar cases in which the likelihood of success [on the merits] for the business is high.”⁵⁶ By contrast, consumers’ claims are “much less likely to involve liquidated amounts and more likely to be contested by businesses.”⁵⁷
- The study’s authors also examined the purported “repeat player” effect, in order to determine the effect on win rates for claimants who pursue arbitration against businesses that appeared in multiple arbitrations before the AAA. Significantly, the authors found that “consumer claimants still recover some amount against both repeat[] and non-repeat businesses over half the time in the case file sample.”⁵⁸ And when

⁵⁴ *Id.* at 902.

⁵⁵ This stands in marked distinction with the “American Rule” that governs attorney’s fees in court proceedings. Under that default rule—where not otherwise altered by statute or contract— “each side in civil litigation has ultimate responsibility for its own lawyer’s fees,” and the losing party does not “pay anything toward the winner’s representation.” Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651, 651. Although the American Rule is the norm in our courts, its effect on the parties’ incentives to litigate is distorted with respect to class actions, in which a court may award class counsel reasonable fees measured by the “lodestar” time cost of litigating the class action or by a percentage of the common fund or common benefits recovered for the class. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3-4 (1991).

⁵⁶ Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898.

⁵⁷ *Id.* at 901.

⁵⁸ *Id.* at 909.

consumer claimants “do prevail on their claim” against a repeat-player business, “they are awarded on average an almost identical percent of the amount claimed against repeat[] businesses (52.4%) as against non-repeat businesses (52.0%).”⁵⁹ The authors concluded, too, that the minor discrepancy between those win rates “does not necessarily show arbitrator (or other) bias in favor of repeat businesses.” Rather, they explained, businesses that repeatedly arbitrate may be better at screening cases ahead of time, allowing them to “settle meritorious claims and arbitrate only weaker claims.”⁶⁰

- According to data released by the AAA about consumer claims resolved between January and August 2007, consumers obtained settlements (or otherwise withdrew their disputes from arbitration) in 60 percent of the cases that they brought against businesses and, in the remaining 40 percent, they prevailed roughly half (48 percent) of the time.⁶¹
- Data released by the independent administrator of Kaiser Foundation Health Plan’s arbitration system revealed that nearly half of claimants obtained resolution to their satisfaction through settlement (44% of claimants in closed cases) or through an award to the claimant after a hearing (5%). “The average award was \$362,161, the median was \$258,913, and the range was from \$8,550 to \$2,528,570.”⁶²
- Critics of voluntary arbitration sometimes point to a report from the advocacy group Public Citizen as purported support for their assertions that arbitration is unfair. But the Public Citizen report shows the folly of examining outcomes in arbitration without comparing them to analogous outcomes in court.

⁵⁹ *Id.* at 912.

⁶⁰ *Id.* at 913.

⁶¹ See *AAA Caseload Analysis*, *supra* note 48.

⁶² Office of the Independent Administrator of the Kaiser Foundation Health Plan Mandatory Arbitration System for Disputes with Health Plan Members, *2012 Annual Report* ii-iii, 2013, <http://www.oia-kaiserarb.com/oia/Forms/2012%20Report.pdf>.

- Public Citizen examined data about claims in arbitration brought by creditors against consumer debtors, and concluded from a high win rate for creditors that arbitration is biased against consumers. But in creditor cases against consumer debtors, the consumer often does not appear and does not contest the claim, and is therefore liable either because he has defaulted or “because he owes the debt.”⁶³
- A more rigorous empirical study subsequently showed that “consumers fare better” in debt-collection arbitrations than in litigation in court.⁶⁴ In particular, “creditors won some relief in 77.8 percent of the individual AAA debt collection arbitrations and either 64.1 percent or 85.2 percent of the AAA debt collection program arbitrations,” depending on how the research parameters were defined.⁶⁵ By contrast, in contested court cases creditors won relief against consumers between 80% and 100% of the time, depending on the court. And consumers fared even worse in court when they did not contest the creditor’s claim—courts routinely award default judgments against consumers when they fail to show up.⁶⁶
- Professor Peter Rutledge of the University of Georgia has reviewed the empirical studies comparing arbitration and litigation, and concluded that “raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed . . . do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation.”⁶⁷

In short, consumers consistently achieve outcomes in arbitration that are comparable or superior to the outcomes in court. Although the Bureau is not directly

⁶³ Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 Disp. Resol. Mag. 30, 31 (Fall 2008).

⁶⁴ Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 97 (Winter 2011).

⁶⁵ *Id.* at 91.

⁶⁶ *Id.* at 111-16 (Tables D.1-D.5) (comparing creditor claimant wins and consumer respondent wins, in cases without consumer responses).

⁶⁷ Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol’y 549, 560 (Summer 2008).

concerned with the use of arbitration in the employment context, it is worth noting that studies of employment arbitration reach the same result: employees in arbitration do as well as, or better than, employees in court. For example:

- A study of 186 plaintiffs who pursued employment arbitration in the securities industry concluded that employees who arbitrate were more likely to win their disputes than employees who litigate in federal court. The study compared the employees' success rate in arbitration to that of 125 employees who litigated discrimination suits to a resolution in the Southern District of New York. The study found that 46% of those who arbitrated won, as compared to only 34% in litigation; the median monetary award in arbitration was higher; only 3.8% of the litigated cases studied ever reached a jury trial; and the arbitrations were resolved 33% faster than in court.⁶⁸
- One study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf. These employees were often able to pursue their arbitrations without an attorney, and they won their arbitrations at the same rate as individuals with representation.⁶⁹
- A later study of 261 AAA employment awards from the same period found that for higher-income employees, win rates in like cases in arbitration and litigation were essentially equal, as were median damages.⁷⁰ The study attempted to compare “apples” to “apples” by considering separately cases that involved and those that did not involve discrimination claims.⁷¹ With respect to

⁶⁸ Delikat & Kleiner, 58 Disp. Resol. J. at 58.

⁶⁹ Hill, 18 Ohio St. J. on Disp. Resol. at 785-88 (summarizing results of past studies by Lisa Bingham that lacked empirical evidence proving the existence of an alleged “repeat player” and “repeat arbitrator” effect).

⁷⁰ Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 48, 50 (Nov. 2003-Jan. 2004).

⁷¹ See *id.* at 49. Because prior research had shown that discrimination claimants “fare noticeably worse in litigation [in court] than other claimants” (*id.* at 48), and “civil-rights claims predominat[ed] in the trial group” sample of court cases (*id.* at 49), the study controlled for the makeup of the data set in court cases in order to draw meaningful comparisons. This control was aimed at ensuring that arbitration outcomes would not “look more pro-employee than they should simply based on the makeup of the sample.” *Id.* at 49.

discrimination and non-discrimination claims alike, the study found no statistically significant difference in the success rates of higher-income employees in arbitration and in litigation. For lower-income employees, the study did not attempt to draw comparisons between results in arbitration and in litigation, because lower-income employees appeared to lack meaningful access to the courts—and therefore could not bring a sufficient volume of court cases to provide a baseline for comparison.⁷²

- Another separate study of the arbitration of employment-discrimination claims concluded that arbitration is “substantially fair to employees, including those employees at the lower end of the income scale,” with employees enjoying a win rate comparable to the win rate for employees proceeding in federal court.⁷³
- In 2004, the National Workrights Institute compiled all available employment-arbitration studies, and concluded that employees were almost 20% more likely to win in arbitration than in litigated employment cases. It also concluded that in almost half of employment arbitrations, employees were seeking redress for claims too small to support cost-effective litigation. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation.⁷⁴
- Lewis Maltby, a noted employee advocate and current president of the National Workrights Institute, examined a variety of studies and statistics in 1998 and concluded that the litigation system was far less employee-friendly than commonly believed, and that the arbitration system is far **more** employee-friendly. Employees in arbitration in the 1993-1995 period won over 63% of their arbitrations, as compared to 14.9% of federal-district-court cases; as a group, employees also fared better in arbitration than in court in terms of

⁷² *Id.* at 45, 47-48.

⁷³ See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003) (reporting employee win rate in arbitration of 43 percent); see also Eisenberg & Hill, 58 Disp. Resol. J. at 48 tbl. 1 (reporting employee win rate in federal district court during the same time period was 36.4 percent).

⁷⁴ National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004), https://web.archive.org/web/20090423052708/http://www.workrights.org/current/cd_arbitration.html.

damages received, compared to initial demands.⁷⁵ In short, employees who arbitrate prevailed more often than employees who litigate.

As one study published in the *Stanford Law Review* explained in surveying the empirical research, “[w]hat seems clear from the results of these studies is that the assertions of many **arbitration critics were either overstated or simply wrong.**”⁷⁶ There simply is no empirical support for the contention that arbitration leads to unfair or subpar outcomes when compared with litigation in our overcrowded court system. Rather, the overwhelming weight of the available evidence establishes reflects that arbitration allows consumers and employees to obtain redress faster, cheaper, and more effectively than they could in court.

3. Existing Law Protects Consumers Against Unfair Arbitration Procedures and Biased Arbitrators.

Critics of arbitration sometimes claim that consumers are subjected to unfair arbitration procedures. But current law already contains clear and effective protections against unfair arbitration clauses, and state and federal courts consistently strike down those arbitration clauses that transgress those limits.

State contract law has long recognized that “contracts of adhesion”—take-it-or-leave-it standard-form agreements that are essential to the efficient operation of our mass-market economy—can be unfair to consumers or employees in some circumstances. The unconscionability doctrine addresses this concern by empowering courts to invalidate contract provisions that are unfair to consumers or employees. ***Unconscionability standards apply to arbitration contracts.*** Section 2 of the Federal Arbitration Act empowers courts to exercise their authority to review arbitration agreements for compliance with generally-applicable state-law contract principles, including unconscionability.

Indeed, just last year in *Marmet Health Care Center, Inc. v. Brown*, the Court recognized that arbitration agreements may be invalidated under unconscionability

⁷⁵ Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (Fall 1998).

⁷⁶ Sherwyn et al., 57 Stan. L. Rev. at 1567 (emphasis added).

standards “that are not specific to arbitration.”⁷⁷ (Of course, states cannot discriminate against arbitration contracts by subjecting them to different and harsher standards.)

Courts inquire into the fairness of arbitration provisions in the context of particular clauses and cases, but one thing is clear: ***when courts find arbitration provisions unfair to consumers or employees under generally applicable principles, they do not hesitate to invalidate the agreements.*** For example:

- **Courts invalidate contractual limits on damages that can be awarded by an arbitrator:** Courts police arbitration agreements to ensure that consumers and employees retain their substantive rights in arbitration and can seek individual remedies in arbitration to the same extent as they could in court.
 - Thus, a Texas court struck down an arbitration provision that barred the consumers from recovering damages or attorneys’ fees under that state’s Deceptive Trade Practices—Consumer Protection Act.⁷⁸ Another court refused to enforce an arbitration agreement that purported to limit damages to “actual and direct” damages, which would have had the effect of limiting individual remedies under the Home Ownership Equity Protection Act, 15 U.S.C. § 1639.⁷⁹ Courts regularly refuse to enforce other damages limitations.⁸⁰
 - Numerous courts have refused to enforce arbitration agreements that prevent an individual from recovering punitive damages.⁸¹

⁷⁷ 132 S. Ct. 1201, 1204 (2012).

⁷⁸ *Venture Cotton Coop. v. Freeman*, 395 S.W.3d 272 (Tex. Ct. App. 2013).

⁷⁹ *Mortg. Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351, 352, 355 (Ky. Ct. App. 2008).

⁸⁰ See also *Carll v. Terminix Int’l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002) (striking provision that barred consumers from recovering damages for personal injury); *Stirten v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (striking arbitration agreement that barred all relief other than actual damages for breach-of-contract claims).

⁸¹ See, e.g., *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008).

- In addition to these decisions, the Supreme Court recently explained that federal law would likely require invalidating “a provision in an arbitration agreement forbidding the assertion of certain [federal] statutory rights.”⁸²
- **Courts reject requirements that arbitration take place in inconvenient locations:** Courts carefully and closely scrutinize provisions that require consumers to arbitrate in a particular location.
 - A federal court in Oregon refused to enforce an agreement that would have required an Oregon consumer to travel to California to arbitrate a dispute concerning a debt-relief agreement, and a Virginia trial court struck down an arbitration provision as unconscionable in part because it required consumers who had bought used cars in Virginia to arbitrate their claims in Los Angeles.⁸³ Many other courts have reached similar conclusions.⁸⁴
- **Courts strike down agreements with biased procedures for selecting the arbitrator:** Courts invalidate arbitration provisions found to deprive consumers or employees of a fair opportunity to participate in the selection of an arbitrator.
 - The U.S. Court of Appeals for the Ninth Circuit recently held that an arbitration agreement was unconscionable and unenforceable when it “would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s],” and barred selection of “institutional arbitration administrators.”⁸⁵

⁸² *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

⁸³ See *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012); *Pbilyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. Spotsylvania Cnty. 2001).

⁸⁴ See, e.g., *College Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006) (severing provision that would have required Texas retail store manager to arbitrate in Indianapolis, Indiana); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (severing provision that would have required Missouri consumer to arbitrate in Arkansas); *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Ct. App. 2000) (refusing to enforce agreement that would have required Los Angeles employee to travel to Oakland for arbitration).

⁸⁵ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013).

- The U.S. Court of Appeals for the Fourth Circuit struck down an arbitration agreement that gave the employer the sole right to create a list of arbitrators from whom the employee could then pick.⁸⁶ And a federal district judge in California refused to enforce a provision that would have granted a company sole discretion to choose an “independent and qualified” arbitrator for its consumer disputes because (under the circumstances) there was no guarantee that the arbitrator would be neutral.⁸⁷
- **Contracts imposing excessive costs to access arbitration are struck down:** The Supreme Court explained in *Green-Tree Fin. Corp.-Ala. v. Randolph* that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim.⁸⁸
 - Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum.⁸⁹ The Ninth Circuit, for example, recently refused to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator’s fees “regardless of the merits of the claim.”⁹⁰ And the Supreme Court reaffirmed in *American Express v. Italian Colors* that a challenge to an arbitration agreement might be successful if “filing and administrative fees attached to arbitration . . .

⁸⁶ *Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297 (4th Cir. 2002); see also *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

⁸⁷ *Newton v. American Debt Services, Inc.*, 854 F. Supp. 2d 712, 726 (N.D. Cal. 2012); see also *Roberts v. Time Plus Payroll Servs., Inc.*, 2008 WL 376288 (E.D. Pa. Feb. 7, 2008) (refusing to enforce provision that would have given employer sole discretion to select arbitrator, and instead requiring parties to select arbitrator jointly); see also *Missouri ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006) (invalidating provision giving president of a local home-builder association sole discretion to pick arbitrator for disputes between local home-builders and home buyers).

⁸⁸ *Randolph*, 531 U.S. at 90-92.

⁸⁹ See, e.g., *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840 (N.D. Ill. 2001); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001).

⁹⁰ *Chavarria*, 733 F.3d at 923-25.

are so high as to make access to the forum impracticable” for a plaintiff.⁹¹

- Other courts have reached the same result under state unconscionability law.⁹²
- **Arbitration agreements subjecting consumers or employees to unreasonably shortened statutes of limitations are not enforced:** For example, courts have rejected provisions in arbitration agreements that would have required employees to bring claims within six months.⁹³
- **Courts invalidate arbitration agreements with “loser pays” provisions:** Courts also protect individuals against arbitration provisions requiring the “loser” of an arbitration to pay the full costs of the arbitration.⁹⁴ And courts do not hesitate to invalidate provisions of arbitration agreements that purport to require the consumer to pay for all costs and expenses of the drafting party regardless of who wins.⁹⁵

The vast majority of arbitration provisions do not exhibit these sorts of defects; and the clear trend has been for companies to make arbitration provisions ever more favorable to their customers and employees. But *when courts find overreaching occurs—in the areas discussed above and many others as well—they have not hesitated to strike down the arbitration provisions.*

⁹¹ *Am. Express Co.*, 133 S. Ct. at 2310-11.

⁹² See, e.g., *Brunke v. Ohio State Home Servs., Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008); *Liebrand v. Brinker Rest. Corp.*, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008); *Murphy v. Mid-West Nat’l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003);

⁹³ See, e.g., *Zaborowski v. MHN Gov’t Servs., Inc.*, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); see also *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen*, 60 Cal. Rptr. 2d at 138 (rejecting provision that imposed shortened one-year statute of limitations).

⁹⁴ See *Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

⁹⁵ See, e.g., *In re Checking Account Overdraft Litig.* MDL No. 2036, 485 F. App’x 403 (11th Cir. 2012); see also *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys’ fees).

4. **The Leading Arbitration Forums Provide Additional Fairness Protections.**

The American Arbitration Association (AAA) and JAMS—the nation’s leading arbitration service providers—recognize that independence, due process, and reasonable costs to consumers are vital elements of a fair and accessible arbitration system. They therefore adhere to standards that establish basic requirements of procedural fairness that provide strong protections for consumers and employees. Those providers will not administer an arbitration unless the operative clause is consistent with standards for procedural fairness.

The not-for-profit AAA has served the public since 1926. With offices throughout the United States and around the world, it is among the largest providers of alternative dispute resolution.⁹⁶ The AAA maintains a roster of over 7,500 impartial arbitrators and mediators with differing areas of expertise and vast experience.⁹⁷ Similarly, JAMS is another leading provider of alternative dispute – resolution.⁹⁸ JAMS resolves over 10,000 cases each year and maintains hearing locations worldwide.⁹⁹ JAMS employs over 300 full-time exclusive neutrals, many of whom are retired judges and attorneys.¹⁰⁰

- **Claim Initiation Is Simple and the Rules Are Fair.** In order to initiate a claim under the AAA’s rules, a claimant must: (1) briefly explain the dispute; (2) list the names and addresses of the consumer and the business; (3) specify the amount of money involved; and (4) state what relief the claimant wants.¹⁰¹

⁹⁶ AAA, *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, http://www.adr.org/aaa/faces/s/about/mission/ethicalprinciples?_afLoop=224757641544354&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D224757641544354%26_afWindowMode%3D0%26_adf.ctrl-state%3D1c22qa5a7n_18.

⁹⁷ *Id.*

⁹⁸ JAMS, *About JAMS*, http://www.jamsadr.com/aboutus_overview/.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ AAA, *Consumer Related Disputes, Supplementary Procedures*, *supra* note 46.

JAMS similarly requires simple, straightforward information from consumers who initiate disputes, and provides an easy-to-complete online form.¹⁰²

- **Financial Burden Largely Falls on Businesses, Not Consumers or Employees.** Through its rules and fee schedules, AAA shifts most of the financial burden of arbitration to businesses and provides refunds of unused fees and unused other services to ease consumers' financial burdens even further. For example, “[i]n cases before a single arbitrator, a nonrefundable filing fee capped in the amount of \$200 is payable in full by the consumer when a claim is filed . . . [a] partially refundable fee in the amount of \$1,500 is payable in full by the business . . .”¹⁰³ Similarly, under JAMS rules, when a consumer initiates arbitration against the company, the consumer is required to pay only \$250, and all other costs are left to the company.¹⁰⁴ In other words, both organizations require *companies* to bear most of the burdens of consumer claims—without regard to who initiated the arbitration.
- **Consumers Play a Key Role in Selecting the Arbitrator.** Arbitration providers screen and help appoint arbitrators, providing the parties with an equal role in selecting the arbitrators in individual proceedings. For example, the AAA provides parties seven days to submit any objections to the appointment of an arbitrator from a list provided by the AAA.¹⁰⁵ Likewise, JAMS rules reaffirm that “consumer[s] must have a reasonable opportunity to participate in the process of choosing the arbitrator(s).”¹⁰⁶
- **Easy-to-Attend Hearings.** For those individuals who want a hearing, the AAA gives the parties an opportunity to have an in-person hearing or, to make

¹⁰² JAMS, *Arbitration Forms*, <http://www.jamsadr.com/arbitration-forms/>.

¹⁰³ AAA, *Costs of Arbitration (Including AAA Administration Fees)*, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased.

¹⁰⁴ JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, <http://www.jamsadr.com/consumer-arbitration/>.

¹⁰⁵ AAA, *Consumer Related Disputes, Supplementary Procedures C-4*, *supra* note 46.

¹⁰⁶ JAMS, *supra* note 104.

things easier and cheaper, parties may choose to participate by telephone.¹⁰⁷ The JAMS rules also seek to provide individuals with easy service when it comes to hearings. Under the JAMS policy, “consumer[s] must have a right to an in-person hearing in his or her hometown area.”¹⁰⁸

- **Governed by Due Process Protocols.** All the consumer protections in place at the AAA are driven by standards that set out basic requirements for procedural fairness. The AAA’s Consumer Due Process Protocol requires independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court.¹⁰⁹ The AAA will not administer a consumer arbitration unless the arbitration is consistent with the Due Process Protocol.

Likewise, JAMS will administer a pre-dispute arbitration clause between a company and a consumer only if the contract clause complies with “minimum standards of fairness.”¹¹⁰

5. Companies Increasingly Are Adopting Consumer-Friendly Arbitration Agreements.

In the wake of the Supreme Court’s decision in *Concepcion*, an increasing number of arbitration agreements include consumer-friendly provisions modeled on the elements of the arbitration agreement upheld in that case.¹¹¹

Companies Shoulder the Costs Of Arbitration. These agreements include provisions making arbitration cost-free to consumers. For example:

¹⁰⁷ AAA, *Consumer Related Disputes, Supplementary Procedures C-6*, *supra* note 46.

¹⁰⁸ JAMS, *supra* note 104.

¹⁰⁹ AAA, *Consumer Due Process Protocol*, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased.

¹¹⁰ JAMS, *supra* note 104.

¹¹¹ Some of these examples were reported in Myriam Gilles, *Killing Them With Kindness: Examining “Consumer-Friendly” Arbitration Agreements After AT&T Mobility v. Concepcion*, 88 Notre Dame L. Rev. 825 (2012). The author of this study is an academic who has been largely critical of consumer arbitration.

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
Amazon.com	“Payment of all filing, administration and arbitrator fees will be governed by the AAA’s rules. We will reimburse those fees for claims totaling less than \$10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon will not seek attorneys’ fees and costs in arbitration unless the arbitrator determines the claims are frivolous.”	http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088
AT&T	“For any non-frivolous claim that does not exceed \$75,000, AT&T will pay all costs of arbitration.”	http://www.att.com/disputeresolution
BMO Harris Bank	“For any non-frivolous Claim with a value of \$75,000 or less, we will pay the filing, administration and arbitrator fees charged by the American Arbitration Association (also referred to in this provision as the ‘AAA’) in connection with the arbitration.”	http://www.bmoharris.com/pdf/global/deposit-agreement.pdf
Dell	“Dell will be responsible for paying any individual consumer’s arbitration fees.”	http://www.dell.com/learn/us/en/19/terms-of-sale-consumer?c=us&l=en&s=dhs&cs=19
Match.com	“If your claim against Match.com is for less than \$1,000, we will pay all fees.”	http://www.match.com/registration/arbitrationProcedures.aspx
Microsoft (Office 2013)	“Disputes Involving \$75,000 or Less. Microsoft will promptly reimburse your filing fees and pay the AAA’s and arbitrator’s fees and expenses. If you reject Microsoft’s last written settlement offer made before the arbitrator was appointed .	http://www.microsoft.com/en-us/legal/arbitration/office2013.aspx

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
	. . . , your dispute goes all the way to an arbitrator’s decision . . . , and the arbitrator awards you more than Microsoft’s last written offer, Microsoft will give you three incentives: (i) pay the greater of the award or \$1,000; (ii) pay twice your reasonable attorney’s fees, if any; and (iii) reimburse any expenses (<i>including expert witness fees and costs</i>) that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration. The arbitrator will determine the amount of fees, costs, and expenses unless you and Microsoft agree on them.”	
Sprint	“Sprint will pay for any filing or case management fees associated with the arbitration and the professional fees for the arbitrator’s services.”	http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml

Expert and Other Costs of Proving Claims In Arbitration Can Be Shifted To Companies. In some very complex cases, it is possible that a consumer or employee might require an expert witness or even complex discovery in order to pursue a claim against a company. Many companies have adopted arbitration provisions that allow for such costs to be shifted to companies if the claimant prevails—*even when the underlying law does not provide for such cost-shifting and cost-shifting therefore would not be available in a judicial lawsuit.*

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
American Express (e.g., Green Card)	<p>“If the arbitrator rules in your favor for an amount greater than any final offer we made before arbitration, the arbitrator’s award will include: (1) any money to which you are entitled, but in no case less than \$5,000; and (2) any reasonable attorney’s fees, costs and expert and other witness fees.”</p>	<p>https://web.aexp-static.com/us/content/pdf/cardmember-agreements/green/AmericanExpressGreenCard.pdf</p>
AT&T	<p>“If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T’s last written settlement offer made before an arbitrator was selected, then AT&T will:</p> <ul style="list-style-type: none"> • pay you the amount of the award or \$10,000 . . . , whichever is greater; and • pay your attorney, if any, twice the amount of attorneys’ fees, and reimburse any expenses (including expert witness fees and costs), that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration....” 	<p>http://www.att.com/disputeresolution</p>
BMO Harris Bank	<p>“If, after finding in your favor on the merits of your Claim(s), the arbitrator issues you an award that is greater than the value of our last written settlement offer made before an arbitrator was selected, then we will . . . pay you the amount of the award or \$5,000, whichever is greater (the</p>	<p>http://www.bmoharris.com/pdf/global/deposit-agreement.pdf</p>

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
	<p>“alternative payment”); and . . . pay your attorney, if any, the amount of attorney’s fees, and reimburse any expenses (including expert witness fees and costs reasonably necessary to prove your Claim), that your attorney reasonably incurs for investigating, preparing, and pursuing your Claim in arbitration (the ‘attorney payment’).” (Emphasis added).</p>	
Electronic Arts	<p>“[I]f we cannot resolve our disputes informally and you are awarded a sum at arbitration greater than EA’s last settlement offer to you (if any), EA will pay you 150% of your arbitration award, up to \$5000 over and above your arbitration award.”</p>	<p>http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/</p>
Microsoft Xbox	<p>“[If y]our dispute goes all the way to an arbitrator’s decision (called an ‘award’), and the arbitrator awards You more than Microsoft’s last written offer, Microsoft will give You three incentives: (i) pay the greater of the award or \$1,000; (ii) pay twice Your reasonable attorney’s fees, if any; and (iii) reimburse any expenses (including expert witness fees and costs) that Your attorney reasonably accrues for investigating, preparing, and pursuing Your claim in arbitration.”</p>	<p>http://www.xbox.com/en-US/Legal/xbox-live-contract-terms</p>

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
Sallie Mae (Bar Study Loan)	If: (i) I submit a Claim Notice in accordance with this paragraph on my own behalf (and not on behalf of any other party); (ii) you refuse to provide the relief I request; and (iii) an arbitrator subsequently determines that I was entitled to such relief (or greater relief), the arbitrator shall award me at least \$5,100 (not including any arbitration fees and attorneys' fees and costs to which I may be entitled under this Arbitration Agreement or applicable law)."	https://www.salliemae.com/assets/products/library/app_barstudystudentloancoborrower.pdf
Santander Bank	"If: (i) you submit a Claim Notice on your own behalf (and not on behalf of any other party) in accordance with subsection n, and you otherwise comply with subsection n (including its resolution and cooperation provisions); (ii) we refuse to provide you with the relief you request; and (iii) an arbitrator subsequently determines that you were entitled to such relief (or greater relief), the arbitrator shall award you at least \$7,500 and will also require us to pay any other fees and costs to which you are entitled."	https://dmob.santanderbank.com/csdlv/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=inline%3Bfilename%3DN3353_MK0034_Sept2013_PDAA+Agreement_r4.pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1354923409319&ssbinary=true

Company	Bounty Provision	Website (last visited Dec. 10, 2013)
Verizon	<p>“WE MAY . . . MAKE A WRITTEN SETTLEMENT OFFER ANYTIME BEFORE ARBITRATION BEGINS. . . . IF YOU DON’T ACCEPT THE OFFER AND THE ARBITRATOR AWARDS YOU AN AMOUNT OF MONEY THAT’S MORE THAN OUR OFFER BUT LESS THAN \$5000, OR IF WE DON’T MAKE YOU AN OFFER, AND THE ARBITRATOR AWARDS YOU ANY AMOUNT OF MONEY BUT LESS THAN \$5,000, THEN WE AGREE TO PAY YOU \$5,000 INSTEAD OF THE AMOUNT AWARDED. IN THAT CASE WE ALSO AGREE TO PAY ANY REASONABLE ATTORNEYS’ FEES AND EXPENSES, REGARDLESS OF WHETHER THE LAW REQUIRES IT FOR YOUR CASE. IF THE ARBITRATOR AWARDS YOU MORE THAN \$5000, THEN WE WILL PAY YOU THAT AMOUNT.”</p>	<p>http://www.verizonwireless.com/b2c/support/customer-agreement</p>

Arbitration Agreements Adopt Informal Procedures That Make It Easy For Claimants To Pursue Their Disputes. These agreements include provisions enabling consumers to choose whether the dispute should be resolved on the basis of a written submission, a telephonic hearing, or in-person proceedings. For example:

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
AT&T	“If your claim is for \$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules.”	http://www.att.com/disputeresolution
Match.com	“If you are seeking less than \$10,000, the arbitrator will decide the dispute based only upon the parties’ written submissions and, if requested by either party, a telephonic hearing. The parties may submit to the arbitrator written statements setting forth their positions no later than 30 days after the arbitrator’s appointment. Each party may also submit a rebuttal or supplemental statement within 10 days after initial statements are due. If a telephonic hearing is requested, it will occur within 45 days after the arbitrator’s appointment.”	http://www.match.com/registration/arbitrationProcedures.aspx
Netflix	“If your claim is for US\$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules..”	https://signup.netflix.com/TermsOfUse

Company	Cost-Sharing Provision	Website (last visited Dec. 10, 2013)
Skype	“You may request a telephonic or in-person hearing by following the American Arbitration Association (“AAA”) rules. In a dispute involving \$10,000 or less, any hearing will be telephonic unless the arbitrator finds good cause to hold an in-person hearing instead.”	http://download.microsoft.com/download/6/6/5/6653B3EA-BD4F-4E48-900D-4995146615B4/More-Arbitration-Terms-for-Skype.pdf
Ticketmaster	“If your claim is for \$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the JAMS Rules.”	https://m.concerts.livestation.com/ticket/portal/article.do?offset=27&site=tmus&page=tmustandc&article=terms and conditions 1&type=BLOGENTRY

6. Arbitration’s Transaction Cost Savings Lead to Lower Prices That Benefit Consumers.

In addition to these direct benefits from arbitration, consumers also benefit through the systematic reduction of litigation-related transaction costs, which lead to lower prices for products and services.

Businesses face a number of costs in bringing their products and services to market. In addition to labor, materials, infrastructure, and other costs of running a business, they must absorb the cost of litigating claims related to those products and services. Critically, the costs associated with litigation include not only settlements and judgments resolving meritorious claims brought by plaintiffs, but also the transaction costs of defending against *all* lawsuits, whether or not the plaintiff ultimately prevails on the claim.

The transaction costs associated with judicial litigation are much higher than those incurred in connection with arbitration, for the reasons already discussed. Although arbitration requires businesses to shoulder the costs related to payments to claimants—as shown above, claimants obtain the same or more in arbitration as in litigation—businesses can avoid the higher litigation costs associated with *defending* claims in court.

That enables them to eliminate costs that otherwise would inflate the prices of their products or services. As scholars have noted, “companies . . . include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices.”¹¹²

II. The Arguments Advanced By Those Seeking To Prohibit Or Regulate Arbitration Agreements Are Meritless.

Notwithstanding the significant benefits that consumers obtain through arbitration, and the substantial protections in current law and practice against unfair arbitration procedures, some argue that arbitration should be prohibited or restricted in various ways. But the reasons they advance for prohibition or regulation simply do not hold up; and the consequence of their preferred approaches would be the elimination of arbitration agreements, which would deprive consumers of the very significant benefits of arbitration discussed above.

A. Prohibiting Pre-Dispute Arbitration Agreements Would Eliminate Arbitration.

Some critics of arbitration recognize that a generalized attack on alternative dispute resolution flies in the face of ADR’s widespread acceptance, especially in light of our overcrowded and overwhelmed court system. To avoid a charge of overt hostility toward alternative dispute resolution, these opponents of arbitration instead frame their attack on “pre-dispute” arbitration agreements—that is, agreements to arbitrate any **future** disputes that might arise between the parties.

¹¹² Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International Econflicts*, 34 U. Ark. Little Rock L. Rev. 779, 779–80 (2012); accord, e.g., Bennett, 67 Disp. Resol. J. at 38 n.55; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–55 (2006).

They assert that post-dispute arbitration agreements—reached after the dispute has already arisen¹¹³—will provide “a means of correcting the problems” they perceive to exist with arbitration.¹¹⁴ They assert that “if arbitration is indeed . . . desirable, it will readily be accepted by claimants in the post-dispute setting.”¹¹⁵

But both the empirical research and leading scholarship on dispute resolution demonstrate that this argument is completely false. Notwithstanding the clear evidence that arbitration is fair, efficient, inexpensive, and good for consumers, business, and employees, the empirical evidence and academic consensus is that ***once a particular dispute arises, the opposing parties will rarely if ever agree to arbitration. Their unwillingness to do so has nothing whatsoever to do with the relative benefits or burdens of arbitration or litigation in court, and instead has everything to do with the practical burdens of administering dual systems and the tactical choices of lawyers in the context of particular cases.***

The post-dispute arbitration agreement is thus an illusion in the consumer and employment contexts. Permitting only post-dispute arbitration agreements therefore would have the real-world consequence of banning arbitration, and depriving consumers of the benefits of arbitration discussed above.

First, “[p]ost-dispute agreements to arbitrate are extremely uncommon.”¹¹⁶ One study found, for instance, that far less than 1% of employment disputes are resolved by post-dispute arbitration *even when a responsible state agency organizes an arbitration program and routinely makes that program available to parties.*¹¹⁷ A second study found that at most “6% of all employment arbitration[s]” initiated before the

¹¹³ Although post-dispute agreements to arbitration are often referred to simply as “post-dispute arbitration,” that label is obviously a misnomer. All arbitration is necessarily “post dispute”; otherwise, there would be nothing to arbitrate. For that reason, we avoid the term “post-dispute arbitration” except when quoting materials that use it.

¹¹⁴ David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 30 (2003).

¹¹⁵ Samuel Estreicher, *Saturns for Ricksbaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567 (2001) (describing detractors’ position and then explaining why it is wrong). Although Estreicher and several of the other authors cited below discuss arbitration in the employment context rather than in the consumer context, their conclusions apply equally to consumer claims.

¹¹⁶ Hamid & Mathieu, 74 Alb. L. Rev. at 785.

¹¹⁷ See Sherwyn, 24 Berkeley J. Emp. & Lab. L. at 61-62.

American Arbitration Association resulted “from post-dispute agreements,”¹¹⁸ notwithstanding that a substantial percentage of consumers—60 percent in 2012—settle their claims in arbitration, and that over 45 percent of the consumers who proceed to an arbitral award receive damages.¹¹⁹

“[I]n all but the rarest cases,” therefore, post-dispute arbitration agreements “will not be offered by one party [and] accepted by the other.”¹²⁰ Indeed, many employment and consumer contracts do not include pre-dispute arbitration clauses, yet parties to those contracts almost never agree to post-dispute arbitration.¹²¹

Second, a company that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations—costs that the company does not incur in connection with judicial litigation. For example, under the AAA’s Supplementary Procedures for consumer dispute resolution, filing fees are capped at \$200 for consumer arbitration—the company must pay up to \$1,500.¹²² And a company that promises to shift attorneys’ or even experts’ fees is likely to take on an uncertain but possibly enormous amount of transaction costs.

Companies are willing to incur these costs because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court. And because the company does not know which consumers “will be claimants,” it is “likely to offer the [arbitration] program to broad categories of” consumers.¹²³

¹¹⁸ Maltby, 30 Wm. Mitchell L. Rev. at 314.

¹¹⁹ See, e.g., FINRA Statistics, *supra* note 48 (50% of FINRA arbitrations closed in 2012 were resolved by direct settlement by the parties, another 10% were resolved by settlement via mediation, and 45% of cases decided by the arbitrator involved an award to the consumer); Cole & Frank, 15 Disp. Resol. Mag. at 32 (finding that consumers “obtained ‘favorable results’” in 80% of “consumer-initiated arbitration[s]”); see also *supra* note 51 and accompanying text (consumers win relief in 53.3% of the cases they file in arbitrations before the American Arbitration Association).

¹²⁰ Estreicher, 16 Ohio St. J. on Disp. Resol. at 567; see also Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267, 279 (2008).

¹²¹ See Maltby, 30 Wm. Mitchell L. Rev. at 321 (employment contracts); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. Rev. 1, 16-18 & table 1 (2013) (credit card agreements); see also, e.g., Rutledge, 9 Cardozo J. Conflict Resol. at 280 (noting that “an overwhelming majority of [lawyers] would advise their clients not to agree to postdispute arbitration”).

¹²² See *supra* note 103.

¹²³ Estreicher, 16 Ohio St. J. on Disp. Resol. at 568.

Well-run arbitration programs are expensive to develop and maintain, meaning that companies will offer them only if they cover most or all possible claims, because only then do they both afford economies of scale and meaningfully manage risk across the set of all potential claimants and claims (both of which are required in order to make consumer-friendly arbitration economically rational for companies).

For that reason, companies will be unwilling to adopt a two-track system of dispute resolution. Faced with the prospect of incurring significant incremental transaction costs in connection with setting up an effective, consumer-friendly arbitration system on one hand, and simultaneously dealing with the risk of the costs of litigating in court, any rational company will choose to minimize those transaction costs. And the only way to do that is to decide not to incur the voluntary incremental costs associated with maintaining an arbitration system, and simply relegate all disputes to the judicial system.

Third, less rational factors contribute to the unwillingness of parties to enter into even mutually beneficial post-dispute agreements to arbitrate. “Disputing parties often have an emotional investment in their respective positions,” meaning that “the calculus of litigation (higher cost, but with greater procedural protection) versus arbitration (generally lower cost, but more informal) may” shift after a dispute.¹²⁴ One or both parties often feel certain—passionately so—that they are correct and have right, justice, and the law on their side; otherwise, the parties would likely have already settled the case. But that (irrational) certainty causes parties to hold out for multi-tiered court proceedings with layers of appellate review in the (usually vain) hope that, sooner or later, a court will come to see that they are right. Visceral dislike for the opposing side in a dispute—exacerbated by the adversarial nature of court proceedings—also plays a role, as “parties are loathe to agree to anything post-dispute when relationships sour.”¹²⁵ So, too, do the “falsely negative assumptions about arbitration” held by some consumers,¹²⁶ not to mention by many lawyers whose default instincts are to trust the court system, no matter how slow, inefficient, and expensive it might be.

¹²⁴ Bennett, 67-Jul. Disp. Resol. J. at 37.

¹²⁵ Schmitz, 34 U. Ark. Little Rock L. Rev. at 785.

¹²⁶ *Id.* Schmitz notes that despite this erroneous general perception, consumers who actually participate in arbitrations were “generally satisfied with [those] proceedings.” *Id.*

In addition, the lawyers for one or both sides may also be enticed by the fee-generating possibilities of prolonged in-court litigation and may therefore advise clients to choose a forum that is really in the lawyers' own best interest rather than in that of the clients—especially in putative class actions, where named plaintiffs assert little control over the litigation and absent class members have no control whatsoever.¹²⁷

All relevant facts therefore point to only one conclusion: post-dispute arbitration agreements “amount to nothing more than a beguiling mirage.”¹²⁸ They simply do not—and would not—happen.

A very significant reduction in access to justice would accordingly result from any attempt to foreclose pre-dispute arbitration agreements and to force consumers and companies into only a post-dispute choice between arbitration and litigation. Eliminating the option of pre-dispute arbitration agreements, and thereby eliminating any real possibility of arbitration of consumer claims, would “den[y]” most consumers “access to” any means of pursuing their claims.¹²⁹ “[P]re-dispute agreements to arbitrate,” which preserve the consumer’s right to an affordable forum, accordingly represent the only real-world option for addressing this very significant gap in access to justice provided to consumers by the court system.¹³⁰

B. Class Actions Provide Little Benefit To Consumers And Are Not Needed To Enable Consumers To Vindicate Their Rights Effectively; Requiring Class Procedures Would Harm Consumers By Depriving Them Of The Benefits Of Arbitration.

¹²⁷ See, e.g., Eric Goldman, *The Irony of Class Action Litigation*, 10 J. ON TELECOMM. & HIGH TECH. L. 309, 314 (2012) (“[C]lass action lawyers often advance their own financial interests at the expense of the class members’ interests.”).

¹²⁸ St. Antoine, 41 U. Mich. J.L. Reform at 790; see also Hamid & Mathieu, 74 Alb. L. Rev. at 785; see also Rutledge, 9 Cardozo J. Conflict Resol. at 280 (“[T]he infrequency of postdispute arbitration is . . . attributable to its structural defects.”).

¹²⁹ Maltby, 30 Wm. Mitchell L. Rev. at 318; see also pages 5-12, *supra*.

¹³⁰ Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping it Lawful*, 60 Case W. Res. L. Rev. 629, 636 (2010).

The principal attack on arbitration stems from the fact that virtually all arbitration agreements require that arbitration proceed on an individual basis and bar class procedures in arbitration and in court.¹³¹ The elimination of class actions, the argument goes, deprives consumers of a procedural mechanism that supposedly provides enormous benefits by allowing the vindication of small claims that (according to the argument) would be too expensive for plaintiffs to arbitrate individually. Therefore, the critics contend, arbitration should be prohibited or, at a minimum, waivers of class procedure should be banned.

In fact, the claims of class action proponents do not match the reality of class actions. A new empirical study of class actions that were filed in 2009 reveals that the overwhelming majority of class actions result in ***no recovery at all for members of the putative class***. None of the class actions studied went to trial or otherwise resulted in a judgment on the merits for the class. The named plaintiff voluntarily dismissed about one-third of the cases studied, either because the plaintiff chose not to continue with the lawsuit or because he settled his own claim on an individual basis. Another third of the cases were dismissed by a court on the merits. And among the remaining consumer class actions that settle, most offer recoveries to class members that are so small in value—if they offer any monetary recovery at all—that few class members find it worth the effort to submit claims for payment. While information about claims rates are scarce, the evidence that does exist makes it clear that it is commonplace for fewer than 10 percent of consumers—and frequently one percent or less—to realize any tangible benefit from class actions in which their claims are released.

It would be irrational for any policymaker to rest a decision on the theoretical benefits of class actions when the real-world evidence shows that class actions provide little or no benefit, particularly in the consumer context.

Moreover, claimants can effectively vindicate in individual arbitration any claims that might be asserted through class actions. Many arbitration provisions require businesses to pay costs of filing claims, to pay incentive or bonus payments to encourage arbitration of small claims, or to shift the costs associated with proving

¹³¹ In *Concepcion*, the Supreme Court concluded that the Federal Arbitration Act requires the enforcement of agreements to arbitrate on an individual rather than class-wide basis. 131 S. Ct. 1740 (2011).

claims. And a number of other means for obtaining economies of scale—such as sharing the costs of proof across a set of individual arbitrations—are not only authorized by most arbitration agreements, but provide a fully viable model of effective dispute resolution.

The alternatives—prohibiting arbitration altogether or requiring class procedures—would have the same result: elimination of arbitration, because companies would not be willing to incur *both* the incremental costs associated with an arbitration system *and* the very high litigation costs associated with class procedures. *That will leave consumers without any means for vindicating the majority of injuries that they suffer—relatively small, individualized claims that cannot practically be asserted in court. Requiring that result to preserve the negligible benefits that class actions actually provide would be a very bad deal for consumers, and for our economy as a whole.*

1. Class Actions Provide Little or No Real Benefit to Consumers.

Proponents of class-action litigation argue that the class device is an effective way for injured individuals to seek recoveries because (in theory) it allows for lawyers to take advantage of economies of scale in representing large numbers of claimants. The reality of class actions falls far short of this promise—*these actions actually deliver little or no relief to consumers*. Lawyers, both plaintiff's lawyers and defense lawyers, are the principal beneficiaries of these claims.

Although the debate about class action has relied on competing anecdotes, we commissioned an empirical analysis of class actions by Mayer Brown LLP. That study, which examined a sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009, is attached to this letter.¹³² The study revealed:

- In the entire data set, *not one of the class actions ended in a final judgment on the merits for the plaintiffs*. And none of the class actions went to trial, either before a judge or a jury.

¹³² For information about the methodology, see Appendix C to the study.

- The vast majority of cases produced ***no benefits to most members of the putative class—class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).
 - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.
 - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff***. Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even though the class members receive nothing***. Information about who receives what in such settlements typically isn't publicly available.
 - ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.
- ***One-third (33%) of resolved cases were settled on a class basis***.
 - This ***settlement rate is half the average for federal court litigation***, meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.
 - ***For those cases that do settle, there is often little or no benefit for class members***.
 - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions***. Unfortunately,

because *information regarding the distribution of class action settlements is rarely available*, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, *five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%*. Those results are consistent with other available information about settlement distribution in consumer class actions.

- Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only *one of the 40* settled cases fell into this category.
- Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for *payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members*.

In short, class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys—both on the plaintiffs’ and defense side.

The lesson that should be taken from this study: Policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions or on a handful of favorable anecdotes to justify the value of class actions. Any decision-maker who assumes that class actions are valuable to consumers would have to engage in significant additional empirical research to conclude—contrary to what this study indicates—that class actions actually do provide significant benefits to consumers.

2. Consumers Can Effectively Vindicate Even Small Claims In Arbitration Without Class Procedures.

The *contention that class procedures are essential to permit vindication of small claims was specifically rejected by both the majority and the dissent in the Supreme Court's recent decision in American Express Co. v. Italian Colors Restaurant.*¹³³ The dissenting opinion, joined by Justices who also dissented in the *Concepcion* case, specifically identified several different ways in which consumers could effectively vindicate even small claims in arbitration without the use of class action procedures:

In this case, . . . the [arbitration] agreement could have prohibited class arbitration without offending the effective-vindication rule *if* it had provided an alternative mechanism to share, shift or reduce the necessary costs. The agreement's problem is that it bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.¹³⁴

In enforcing the arbitration agreement in *Concepcion*, the Supreme Court referenced the lower courts' finding that consumers would be better off in an individual arbitration under the agreement's provisions than in a class action.¹³⁵ The *American Express* dissent also identified that procedure as one that permitted the effective vindication of small claims through individual arbitration.

The arbitration provision that the Supreme Court viewed favorably in *Concepcion* contains both (i) incentive/bonus payments designed to encourage the pursuit of small claims, and (ii) the shifting of expert witness costs and attorneys' fees to defendants when the consumer or employee prevails on his or her claim. If a consumer obtains an arbitral award that is greater than the company's last settlement offer, he or she will receive a minimum recovery of \$10,000 plus twice the amount of attorneys' fees that his or her counsel incurred for bringing the arbitration. In

¹³³ 133 S. Ct. 2304 (2013).

¹³⁴ *Id.* at 2318 (Kagan, J., dissenting). The majority disagreed with the dissent's claim that the agreement at issue in that case barred informal coordination among individual claimants. *Id.* at 2311 n.4.

¹³⁵ *Concepcion*, 131 S. Ct. at 1753.

addition, the company is required to reimburse such a customer for reasonable expert witness fees.

As the dissenters in *American Express* explained, any concerns about whether individuals can vindicate their small claims in arbitration without the class-device are eliminated when an arbitration provision “provide[s] an alternative mechanism to . . . shift . . . the necessary costs.”¹³⁶ A significant number of companies have adopted bonus/cost-shifting approaches similar to the one approved by the Court in *Concepcion*. The tables at pages 28-34 reflect only a sampling of these arbitration provisions.

The *American Express* dissenters further stated that the concern about cost could be addressed through “**informal coordination among individual claimants**” to share the same lawyer, expert, and other elements required to prove the claim.¹³⁷ For example, an entrepreneurial plaintiffs’ lawyer can recruit large numbers of clients (via the internet, social media, or other similar means), file thousands of individual arbitration demands on behalf of those clients, and distribute common costs over all those claimants, making the costs for expert witnesses and fact development negligible on a per-claimant basis.

Given the low cost, efficiency, and fairness of arbitration, it is no surprise that some plaintiffs’ lawyers are already beginning to recognize that pursuing multiple individual arbitrations (or small-claims actions) is an economically viable business model—especially in view of the ability to reach multiple, similarly situated individuals using websites and social media.¹³⁸ Indeed, this strategy for spreading fixed litigation costs is an increasingly common means of pursuing disputes in arbitration.

- Counsel for the plaintiffs in *American Express* indicated at a Practising Law Institute program that if the Supreme Court compelled arbitration the plaintiffs

¹³⁶ *Am. Express*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

¹³⁷ *Id.* (emphasis added). The dissent concluded that the American Express arbitration agreement prohibited such cost-sharing, but the majority disagreed, and American Express specifically conceded before the Supreme Court that costs could be shared in this manner. *See id.* at 2311 n.4 (majority).

¹³⁸ *See* Carolyn Whetzel & Jessie Kokrda Kamens, *Opt Out’s Use of Social Media Against Honda in Small Claims Win Possible “Game Changer,”* Bloomberg BNA Class Action Litig. Rep. (Feb. 10, 2012).

could, and would, pursue their claims through individual arbitrations by using this cost-spreading approach.¹³⁹

- A plaintiff filed a putative class action alleging that AT&T improperly measures the amount of data used by so-called smart devices such as iPhones and iPads, thereby supposedly causing customers to pay more for data usage than they otherwise would. The district court, following the Supreme Court’s holding in *Concepcion*, compelled the plaintiff to arbitrate in accordance with his arbitration agreement.¹⁴⁰ Subsequently, counsel for that plaintiff filed separate demands for arbitration on behalf of more than 1,000 claimants—each making virtually identical allegations and relying on the same expert witness whom the original plaintiff had proffered in support of a class-action lawsuit.
- The Internet and social media have made it easier than ever for aggrieved consumers to find each other. One lawyer “set up a website to recruit plaintiffs” to bring multiple small-claims cases alleging marketing of credit information.¹⁴¹ Similarly, a former lawyer who sued an automaker in small-claims court after opting out of a class action set up a website along with profiles on Twitter and Facebook and a video on YouTube to publicize her case. She was as a result “contacted by hundreds of other car owners seeking guidance in how to file small claims suits if they opted out of” the class action.¹⁴²
- Following the *American Express* ruling, a member of a leading plaintiffs’ firm recognized this new approach: “I think you’ll continue to see firms like mine move into arbitration. If what large corporations want is to have thousands or

¹³⁹ See Gary B. Friedman & Andrew J. Pincus, “Arbitration,” Consumer Financial Services Institute 2013, Practicing Law Institute (Apr. 23, 2013), available at http://www.pli.edu/Content/OnDemand/Consumer_Financial_Services_Institute_2013/_/N-4nZ1z12p2h?fromsearch=false&ID=158662 (video).

¹⁴⁰ See *Hendricks v. AT&T Mobility LLC*, 823 F. Supp. 2d 1015 (N.D. Cal. 2011).

¹⁴¹ See Sara Foley & Jessica Savage, *Court Filings Boost Revenue*, Corpus Christi Caller Times, Nov. 27, 2010, <http://www.caller.com/news/2010/nov/27/court-filings-boost-revenue/>

¹⁴² See Linda Deutsch, *Honda Loses Small-Claims Suit Over Hybrid MPG*, Associated Press, Feb. 1, 2012, <http://www.msnbc.msn.com/id/46228337/ns/business-autos/t/honda-loses-small-claims-suit-over-hybrid-mpg/>

tens of thousands of individual arbitrations as opposed to class actions ... then that's the direction we'll go in. It's a bit of 'be careful what you ask for.'"¹⁴³

- At oral argument in *American Express*, Chief Justice John Roberts suggested that plaintiffs could use the resources of a common interest group, such as a small-merchant trade organization, to “get together and say we want to prepare an antitrust expert report” that could be used in each of the subsequent arbitrations.¹⁴⁴
- In other contexts, the pooling approach has helped plaintiffs lower their individual costs. As one study noted, “[a]n example of how such coordination can work is the large number of individual actions filed in litigation by common counsel for alleged violations of the Fair Debt Collection Practices Act, often against the same defendant.”¹⁴⁵ In no small part because the fixed costs of proving a claim against the same defendant may be spread across many plaintiffs—and because attorneys’ fees are provided by statute¹⁴⁶—one newspaper reported that “[h]igh-volume consumer law firms are churning out [FDCPA] lawsuits as efficiently as the collectors they battle.”¹⁴⁷

In short, consumers, employees, and other potential plaintiffs have a wide array of tools for developing litigation resources and strategy that can be leveraged across a number of individual arbitrations. Social media and other technological innovations make it easier than ever for people who have common grievances to find each other and utilize common resources.

¹⁴³ Melissa Lipman, Plaintiff’s Lawyers Still Hopeful After AmEx Ruling, LAW360 (June 21, 2013), online at <http://www.law360.com/articles/452294/plaintiffs-lawyers-still-hopeful-after-amex-ruling> (quoting Jonathan Selbin).

¹⁴⁴ Oral Argument at 20-21, *Am. Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (No. 12-133), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf.

¹⁴⁵ Gregory C. Cook, *Why American Express v. Italian Colors Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After Concepcion*, 2 Mich. J. L. Reform Online, Apr. 14, 2013, <http://www.mjlr.org/2013/04/why-american-express-v-italian-colors-does-not-matter-and-coordinated-pursuit-of-aggregate-claims-may-be-a-viable-option-after-concepcion/#fnref-2132-14> (footnote omitted).

¹⁴⁶ *Id.* (citing 15 U.S.C. § 1692k).

¹⁴⁷ Chris Serres, *Debtors in Court—Suing Collectors*, Minn. Star-Trib., Mar. 17, 2011, <http://www.startribune.com/investigators/99676349.html?refer=y>.

What is more, there are other ways in which consumers' rights can be vindicated. The Bureau itself can "commence a civil action . . . to impose a civil penalty or to seek all appropriate legal and equitable relief" with respect to a "violat[ion of] a Federal consumer financial law,"¹⁴⁸ which will allow the agency to pursue claims that are properly within the reach of its enforcement authority. And the Bureau has recently issued notice of a proposed Final Rule for its Civil Penalty Fund, which collects penalties imposed in enforcement actions, designating "the conditions under which victims" of Federal consumer financial law violations "will be eligible for payment . . . and the amounts of payments that the Bureau may make to them."¹⁴⁹ The Bureau could use its enforcement authority to seek to vindicate consumers' rights, and the Civil Penalty Fund could be used to augment the opportunity that arbitration provides for consumers to pursue relief. Other federal and state agencies similarly possess a wide range of enforcement authority that can be brought to bear in appropriate circumstances..

In short, there are multiple alternatives to private class action lawsuits in court brought by entrepreneurial plaintiffs' attorneys; these alternatives afford individual consumers actual opportunities to pursue their disputes or otherwise vindicate their rights—in sharp contrast to the false promise of private class actions.

3. Consumer Class Actions Do Not Deter Future Wrongdoing—Deterrence Comes From the Threat of Government Enforcement.

Deterrence theory holds that a party will not engage in wrongdoing if the party believes that it will incur costs for acting wrongfully that it will not incur if it complies with the law. If those costs are incurred without regard to the wrongfulness of the underlying conduct, there is no such deterrent effect.¹⁵⁰ That is the precise flaw in the private class action system.

¹⁴⁸ 12 U.S.C. § 5564(a).

¹⁴⁹ *Consumer Financial Civil Penalty Fund*, 78 Fed. Reg. 26545, 26546 (2013).

¹⁵⁰ For an analogous discussion of how a failure to distinguish adequately between the culpable and the innocent dilutes the deterrent effect of sanctions in the criminal-law context, see A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 Handbook of Law and Economics 403, 427-29 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

Plaintiffs' attorneys have little incentive to choose cases based on the merits of the underlying claims—the merits question will never be reached, as the empirical data demonstrates. The plaintiffs' lawyer's goal, rather, is to find a claim for which the complaint can withstand a motion to dismiss and that can satisfy the (legitimately) high hurdles for class certification—standards that do not embody an assessment of the underlying merit of the claim.

Once a class is certified, settlement virtually always follows, driven by the transaction costs (including e-discovery) that such actions impose—which again have little or no correlation to the underlying merits of the case. The class action thus does not impose burdens only on businesses that engage in wrongful conduct. Instead, the burdens of class actions are chiefly a function of who plaintiffs' lawyers choose to sue rather than who has engaged in actual wrongdoing. The threat of a class action therefore cannot—and does not—generally deter wrongful conduct.¹⁵¹

Businesses are far more likely to be deterred from wrongdoing by the reputational consequences of engaging in improper behavior, especially because reputational harm is often directly correlated to a business's success or failure. Especially in an age of social media, consumer complaints can quickly go viral, impacting companies immediately and directly leading to changes in practices that garner consumer opposition. Class actions, by contrast, do nothing of the sort.

In sum, deterrence concerns provide no justification for maintaining the availability of private class actions.¹⁵²

¹⁵¹ Indeed, to the extent there is any effect associated with class actions, it is likely to deter both lawful and unlawful actions equally—requiring companies to take into account the risk of litigation costs without regard to the legality of the underlying action.

¹⁵² Nor should arbitration be restricted or prohibited because—as some critics of arbitration sometimes contend—arbitration reduces publicly-available precedent. Most court cases are resolved by settlement, and virtually all class actions are settled; these cases offer no real guidance to other parties about what conduct will subject them to or insulate them from a future lawsuit. And most individual consumer cases brought in arbitration could not practically be litigated in court—and therefore would not produce precedent if arbitration did not exist.

Consumer arbitration does not permit companies to conceal their wrongdoing, however. California, the District of Columbia, and several other states have required arbitration providers to publish information about the disposition of arbitration cases. And we are not aware of any arbitration agreement that prohibits a consumer from disclosing the substance of a claim asserted in arbitration and the disposition of that claim. (Arbitration proceedings themselves—the filings of the parties and any oral presentations—are confidential, but that restriction does not preclude parties from publicly discussing the nature of the claims and how they were decided.)

4. **Requiring Class Procedures Would Eliminate Arbitration and Deprive Consumers of Arbitration’s Significant Benefits.**

Based on the erroneous assumption that class-wide procedures are necessary to vindicate small-value claims, some critics of arbitration have urged that arbitration agreements should be required to permit either class-wide arbitration or the filing of class actions in court. Like the argument in favor of permitting only “post-dispute arbitration agreements,” however, this contention—if accepted—would eliminate consumer arbitration.

As explained above,¹⁵³ a company that sets up an arbitration program incurs significant administrative costs—which they are willing to absorb because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court.

If faced with the prospect of incurring significant incremental transaction costs in connection with setting up an effective, consumer-friendly arbitration system on one hand, and simultaneously dealing with the huge costs of litigating class actions in court, all rational companies will choose to minimize those transaction costs.¹⁵⁴ And the only way to do that is to decide not to incur the voluntary incremental costs

¹⁵³ See *supra* pages 37-38.

¹⁵⁴ Indeed, class actions impose particularly large litigation costs unrelated to the merits of the underlying claims. According to a survey of general counsel or senior litigation officers of over 300 companies conducted by Carlton Fields, corporations spend more than \$2 billion annually on class action lawsuits. Carlton Fields, *The 2013 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 37 (2013), <http://www.carltonfields.com/files/uploads/Carlton-Fields-Class-Action-Report-2013-electronic.pdf> (compiling 368 “in-depth interviews with general counsel, chief legal officers, and direct reports to general counsel”). In the modern business world, many class actions that are litigated past the pleading stage impose extraordinarily burdensome e-discovery costs, as plaintiffs’ lawyers demand e-mails and other electronic files from dozens, if not more, company employees. In fact, a defendant business generally bears the brunt of discovery costs, which can amount to many millions of dollars.

Thus, a recent study by the RAND Institute for Civil Justice of discovery costs in a representative sample of cases found the cost-per-case for producing electronically-stored information ranged from \$17,000 to \$27 million, with a *median cost of \$1.8 million per case*. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 17 (RAND Institute for Civil Justice 2012). Class actions obviously would fall at the upper end of that range.

Requiring companies to continue to face these costs would eliminate the transaction cost savings produced by arbitration—with “arbitration plus class actions” a much more costly system than “court litigation alone,” companies would choose court litigation. Ware, 5 J. Am. Arb. at 291.

associated with maintaining an arbitration system, and simply relegate all disputes to the judicial system.¹⁵⁵ Indeed, many companies have publicly stated that they would abandon arbitration entirely if the class-action waivers contained in their arbitration agreements are rendered unenforceable.

* * * * *

Although the proponents of class actions argue that these lawsuits provide a practical mechanism for vindication of consumers' small-value claims, the real-world evidence demonstrates that they do not. As the study of class actions filed in 2009 reveals, few members of putative classes ever see any recovery in a class action; even in those cases that settle, individuals are usually offered small recoveries, and evidently few class members find it worth their while to submit claims for such paltry payouts. Other settlements offer "benefits"—such as injunctive relief or donations to charities—that in fact have little value to individuals.

Although the value of class actions is premised on the economies of scale that may be reached by aggregating low-value claims, achieving those economies does not require slow and costly class-wide proceedings in court. Rather, there are a number of ways for individual claimants to economize on the costs of proving their claims in individual arbitration proceedings. And individual arbitration proceedings are consistent with the deterrent purposes of litigation and the need for fairness to all parties.

In sum, class-wide proceedings do not deliver on the promises that their proponents have made. Conditioning the enforcement of arbitration proceedings on requiring class proceedings will harm consumers by eliminating arbitration and relegating them to a judicial system that completely precludes litigation of the

¹⁵⁵ Class arbitration is an irrational choice for both businesses and consumers. First, class arbitration, by contrast, is every bit as burdensome, expensive, and time-consuming as class-action litigation, if not more so. Thus, as of September 2009 the AAA had opened 283 class arbitrations, *none* of which had resulted in a final award on the merits. *See* Brief of AAA as *Amicus Curiae* at 22-23, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2896309. For those class arbitrations that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days (1.6 years), and the mean was 630 days (1.7 years). *Id.* at 24.

Second, class arbitration may not provide all of the procedural protections for absent class members that are present in judicial class actions. Class arbitration therefore could lead to outcomes that are quite unfair to members of the class.

relatively small individualized claims that make up the majority of consumer injuries and provides no real-world benefit to consumers through the mechanism of class actions.

III. The Bureau Should Not Even Consider Regulations Overturning The Federal Arbitration Act Without Clear Empirical Evidence Of Consumer Harm—And That Evidence Does Not Exist.

Arbitration of consumer disputes has been common practice for over two decades. There are perhaps hundreds of millions of consumer contracts currently in force that include arbitration agreements—many of them relating to consumer financial products or services.

The system we have today of resolving disputes fairly and efficiently in arbitration stands in stark contrast to the court-centric views of earlier times. “Until the early twentieth century, courts in the United States displayed a marked hostility to predispute arbitration agreements,” which they considered “illegal attempts to oust courts of their jurisdiction.”¹⁵⁶ But Congress concluded that arbitration was beneficial for individuals and businesses alike, and therefore enacted the Federal Arbitration Act (9 U.S.C. §§ 1-16) to ensure that arbitration agreements were enforceable. As Justice Stephen Breyer has observed, “Congress, when enacting th[e FAA], had the needs of consumers, as well as others, in mind.”¹⁵⁷

The criticisms of arbitration being made today resemble those that were rampant at the time Congress enacted the FAA—they are based on false stereotypes rather than reality. Claims about the benefits of the judicial system are based on similar illusions, grounded in the hyper-idealized theory learned in law school rather than the stark reality of what actually happens today in our nation’s courts.

And these unsupported, and unsupportable, arguments are being promoted by well-funded interest groups pursuing their own interests, and not the interests of

¹⁵⁶ Rutledge, 6 Geo. J.L. Pub. Pol’y at 552 (citing 1 Ian R. Macneil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* § 4.3.2.2 (1996)).

¹⁵⁷ *Allied-Bruce Terminix*, 513 U.S. at 280. See also S. Rep. No. 68-536, at 3 (1924) (“The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests *as well as to individuals.*”) (emphasis added).

consumers. According to the Associated Press, for example, one of the “[t]op lobbying goals” of the American Association for Justice (formerly the Association of Trial Lawyers of America, or “ATLA”) has been to convince “Congress and [President] Obama to outlaw mandatory binding arbitration in consumer contracts.”¹⁵⁸ As we have discussed, the individuals who benefit most from arbitration—***the majority of consumers and employees whose individualized claims are too small to be of interest to contingency-fee-driven plaintiffs’ lawyers, and too fact-specific to be included in class actions***—would be left with no recourse. Yet plaintiffs’ lawyers are willing to trade those individual consumers’ claims away so that they may continue to pursue class actions that allow them to reap large fee awards while leaving class members with pennies on the dollar—if anything at all.

In carrying out the Dodd-Frank Act’s mandate to study arbitration, the Bureau must ignore false stereotypes, caricatures, and selective anecdotes and focus instead on the realities of arbitration and the realities of the judicial system. Any regulation the Bureau may adopt must be based on a conclusion that “such a prohibition or imposition of conditions or limitations is in the *public interest and for the protection of consumers*. The findings of such a rule *shall be consistent with the study conducted under subsection (a)*.”¹⁵⁹ Because the Bureau’s rulemaking authority requires it to consider “the potential benefits and costs to consumers and [regulated businesses],”¹⁶⁰ the study must do so as well.¹⁶¹

As we have explained, the relevant evidence demonstrates overwhelmingly that arbitration serves the interests of individuals and businesses alike by providing access to justice quickly, fairly, and at low cost. Eliminating arbitration, or imposing regulations that would have that effect, will harm consumers by eliminating this critically important method of adjudicating disputes that simply cannot be resolved practically in court.

¹⁵⁸ Sharon Theimer & Pete Yost, *The Influence Game: Lobbyists adapt to power shift*, USA Today, Nov. 14, 2008, http://usatoday30.usatoday.com/news/washington/2008-11-14-567071791_x.htm?csp=34.

¹⁵⁹ 12 U.S.C. § 5518(b) (emphasis added).

¹⁶⁰ *Id.* § 5512(b)(2)(A)(i).

¹⁶¹ Courts rigorously oversee an agency’s assessment of costs and benefits. *See, e.g., Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

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We thank you for your consideration of these comments and would be happy to discuss these issues further with the Bureau's staff.

Sincerely,



David Hirschmann
President and Chief Executive Officer
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce



Lisa A. Rickard
President
U.S. Chamber Institute for Legal
Reform

Attachment