Testimony of

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before the

Senate Judiciary Committee

"Arbitration in America"

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I appreciate the opportunity to participate in this hearing concerning Arbitration in America.[1] The topic is of utmost importance to financial services companies and their customers nationwide, and it has been central to my practice of law for the past 20 years.

I am a senior partner and Practice Leader of the almost 110-person Consumer Financial Services Group at Ballard Spahr LLP in their 15 offices. I devote my practice exclusively to: (i) counseling financial services companies with respect to bank regulatory and transactional matters, particularly consumer arbitration and financial services law, and (ii) defending them when they are sued by consumers and governmental enforcement agencies in individual and class action lawsuits. I was the first president of the American College of Consumer Financial Services Lawyers, an organization founded in order to honor those lawyers who have made substantial contributions to the development of consumer financial services law. In April of 2016, I received the American College's Lifetime Achievement Award. The award is granted periodically to a person whose career has produced significant contributions to the field of consumer financial services law. I am a past chair of the Committee on Consumer Financial

[1] I gratefully acknowledge the help of my partner, Mark J. Levin, in preparing this written testimony.

Services of the Section of Business Law of the American Bar Association. I have been named as a tier one banking and consumer financial services lawyer in the 2006-2018 editions of *Chambers USA: America's Leading Lawyers for Business*, a directory of America's leading lawyers. I have also been named in *The Best Lawyers in America* under financial services regulation law and banking and finance litigation from 2007-2018. For 24 years, I have annually co-chaired for the Practicing Law Institute its Annual Institute on Consumer Financial Services in New York, Chicago and San Francisco. I was recently selected for my work on the Consumer Finance blog for the National Law Review's 2018 Go-To Thought Leadership Award to honor excellence in legal news and analysis.

As a core part of my practice, since the late-1990's I have been extensively involved along with other partners in my firm with the drafting and enforcement of arbitration clauses in consumer contracts such as bank deposit and credit card and other loan agreements. I was named to the National Law Journal's 2015 list of Litigation Trailblazers for pioneering work in the area of consumer arbitration and the use of class action waivers. I was featured in the November 1, 2015 New York Times lead front page article about pioneering class action waivers in consumer arbitration provisions. I was instrumental in launching my Firm's blog and podcast series, Consumer Finance Monitor, devoted to the activities of the Consumer Financial Protection Bureau ("CFPB") as well as federal and state agencies and attorneys general and other significant consumer financial services developments. I have been counsel in numerous significant consumer arbitration actions in the United States Supreme Court and other federal and state appellate and trial courts throughout the country.[2] I am often retained by national and state trade associations to

[2] *See, e.g., Missouri Title Loans, Inc. v. Brewer*, 563 U.S. 971 (2011); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Baron v. Best Buy Co., Inc.*, 260 F.3d 625 (11th Cir. 2001); *Cappalli v. National Bank of the Great Lakes*, 281 F.3d 219 (3d Cir. 2001); *Providian Fin.*

submit amicus briefs in important consumer arbitration appellate cases.[3] In addition, I have authored or co-authored dozens of scholarly articles dealing with various consumer arbitration issues, including updates on arbitration developments published annually since 1998 in The Business Lawyer for the Business Law Section of the American Bar Association. I have also served as an instructor in several continuing education seminars involving consumer arbitration.

I am here today to provide my own views on the subject of consumer arbitration, and my law firm and I are not being compensated in any fashion for my testimony. Accordingly, my opinions do not necessarily reflect the opinions of any of my firm's clients.

INTRODUCTION

Based upon my experience, I firmly and wholeheartedly believe that the system that is presently in place in connection with consumer arbitrations under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 *et seq.*, is working very well and, in particular, provides abundant benefits and protections to consumers who are parties to arbitration agreements with financial services companies. These protections emanate from (1) the Federal Arbitration Act ("FAA") itself, (2) the companies whose contracts contain arbitration agreements, (3) the neutral third-party

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Corp. v. Coleman, No. 02-60943 (5th Cir. May 21, 2003) (per curiam); *Jenkins v. First American Cash Advance of Georgia, Inc.*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1457 (2006); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009); *Rosen v. Saks Inc.*, 2003 Ill. App. LEXIS 1252 (Ct. App., 1st Dist. Oct. 8, 2003), *review denied*, 2004 Ill. LEXIS 142 (Ill. Jan. 28, 2004); *Providian National Bank v. Screws*, 2003 Ala. LEXIS 298 (Ala. Sup. Ct. Oct. 3, 2003); *Tsadilas v. Providian National Bank*, No., 2004 WL 2903518 (N.Y. App. Div. Dec. 16, 2004).

[3] *See, e.g., American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (amicus brief filed Dec. 28, 2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (amicus brief filed Aug. 9, 2010); *Discover Bank v. Szetela*, No. 02-829 (U.S. Sup. Ct.) (amicus brief filed Dec. 30, 2002); *Salley v. Option One Mortgage Corp.*, 592 Pa. 323, 925 A.2d 115 (amicus brief filed April 12, 2006).

arbitration administrators who typically administer companies' arbitration programs and (4) the state and federal courts which rigorously enforce the FAA and applicable state laws.

My partners and I have always counseled our clients that the fundamental principle in implementing a consumer arbitration program is to be fair to consumers. Our clients uniformly follow that advice, and I believe that the vast majority of companies that have adopted consumer arbitration programs likewise follow the same standard of fairness. As a practical matter, companies have no choice but to be fair in their consumer arbitration agreements, because if they are not, the arbitration administrators will not administer their arbitrations and the courts will not enforce their arbitration agreements.

Companies utilize arbitration because, as the United States Supreme Court has repeatedly stated, it is faster, less costly and more efficient than litigation, *not* because it provides some sort of trap for unwary consumers. In fact, the Supreme Court has emphasized that arbitration is favored in disputes between consumers and companies: "[T]he Act [FAA], by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, corporate interests [and] individuals.' Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citations omitted). Arbitration enables companies to reduce the costs of dispute resolution which, in turn, inures to the benefit of consumers. In fact, the CFPB itself estimated that without the present system of arbitration, 53,000 financial services providers who currently utilize arbitration agreements would incur between $2.62 billion and $5.23 billion on a continuing five year basis in defending against an additional 6,042 class actions that will be brought every five years.[4]

[4] *See* 81 FR 32907-32909.

The Supreme Court has also made clear on numerous occasions that an arbitration agreement is not an exculpatory clause for companies. That is because by agreeing to arbitrate, "a party does not forgo ... substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *accord, Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. at 90 ("even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions") (citation omitted).

While you may have read or heard about instances where a particular arbitration agreement did not adequately protect the consumer's rights or was tilted too far in favor of the company, those instances are few and far between. In the vast majority of cases the existing system works – and works very well – because (1) companies have gone to great lengths to make their arbitration programs fair, even to the point of giving consumers the unconditional right to reject arbitration when they enter into the transaction; (2) the leading national arbitration administrators, the American Arbitration Association ("AAA") and JAMS, have adopted consumer due process protocols and consumer rules and fee schedules which ensure that the consumer will be treated fairly and that arbitration will be affordable to the consumer; and (3) the courts have rigorously struck down arbitration agreements that they have found to be overreaching, unfair or abusive to consumers, while enforcing those that are reasonable and legally and equitably sound. This existing "check and balance" system operates dynamically and very successfully within the framework of the FAA to protect the rights of all parties to the consumer arbitration agreement, consumer and company alike.

EMPIRICAL STUDIES CONFIRM THAT CONSUMER ARBITRATION IS FAIR

It is my opinion that the present system of checks and balances in the area of consumer arbitration has never been more robust or more protective of consumers' rights. But you do not have to take just my word for it. There are numerous empirical studies that have documented the success that consumers have had in arbitration and the satisfaction that the majority of consumers have expressed in the arbitration process.

A. CFPB Consumer Arbitration Study

On March 10, 2015, the CFPB issued an exhaustive 728-page Study of consumer arbitration,[5] which then-Chairman Corday aptly described as "the most comprehensive empirical study of consumer financial arbitration ever conducted."[6] The data in the CFPB's Study confirms that individual arbitration is faster, less expensive and far more beneficial to consumers than litigation, including class action litigation.

In order to keep arbitration simple, inexpensive and speedy, many consumer arbitration agreements provide that neither party has the right to bring a class action or representative suit in court or in arbitration with respect to claims that are subject to the arbitration agreement. These "class action waivers" substantially lower litigation costs and the cost savings are passed through to consumers, in whole or in part, in the form of lower prices for goods and services. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer*

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5 *See* https://files.consumerfinance.gov/f/201503_cfpb_ arbitration-study-report-to-congress-2015.pdf.

6 Richard Cordray, Prepared Remarks of Richard Cordray at the Arbitration Field Hearing (Mar. 10, 2015), *available at* http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/.

Arbitration Agreements, 2001 J. Disp. Resolution 89, 91-93; Richard A. Posner, Economic Analysis of Law 7 (6th ed. 2003).

In 2011, the United States Supreme Court held that under the FAA, class action waivers in consumer arbitration agreements are valid and enforceable according to their terms. *See AT&T Mobility LLC v. Concepcion, supra*. It is important to emphasize that while class action waivers still are not without their critics, the data analyzed in the CFPB's Study clearly demonstrates that individual arbitration produces more tangible benefits to consumers than class action litigation.[7] In particular:

i. Arbitration Is Faster for Consumers than Class Action Litigation

The Study demonstrated that consumer arbitration is up to 12 times faster than consumer class action litigation. The CFPB's data showed that: (i) the median desk arbitration (just documents) was resolved in 4 months; (ii) the median telephone arbitration was resolved in 5 months; (iii) the median in-person hearing was resolved in 7 months; and (iv) when the arbitration settled, the median arbitration proceeding lasted 2-5 months.[8] By contrast, the average class action settlement received final court approval in 1.89 years, and federal court multi-district litigation class actions filed in 2010 closed in a median of 2.07 years.[9]

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[7] Arbitration also provides many intangible benefits. The arbitration venue is typically much nicer than a courtroom. In arbitration, consumers can tell their story to an arbitrator sitting at a conference table, unencumbered by the cold formalities of a courtroom and the rigid court rules governing procedure and evidence. Consumers can even participate by telephone or Skype while thousands of miles away. Such conveniences and efficiencies do not exist in court, which can be intimidating and frustrating to non-lawyers and fraught with unpleasantries and delays.

[8] Study, § 1, p. 13.

[9] *Id.* § 6, pp. 9, 43.

ii. Arbitration Is Less Expensive for Consumers than Class Action Litigation

The Study showed that consumers pay far less to arbitrate than to sue in court. Prior to September 14, 2014, the consumer's portion of the administrative and arbitrator fees charged by the AAA under its consumer rules was capped at $125. The company paid all of the remaining fees. Under the AAA's revised consumer rules, the consumer's share of those fees is capped at $200, with the company paying the remainder.[10] That is only one-half of the $400 it costs to file a new class action complaint in federal court.[11] Similarly, JAMS caps the consumer's administrative fees at $250 and the company pays the remainder.[12]

iii. Consumers Recover More in Arbitration than in Class Action Litigation

According to the Study, in arbitrations where consumers obtained relief on affirmative claims and the CFPB could determine the amount of the award, the consumer's average recovery was **$5,389** (an average of 57 cents for every dollar claimed).[13] In sharp contrast, the average recovery for class members in consumer class action settlements was a mere **$32.35**.[14] Thus, the consumer's average recovery in arbitration was 166 times greater than the average

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10 *Id.*, § 1, p. 13; § 4, pp. 10-11. Moreover, consumers are permitted to apply for a hardship waiver if they cannot pay these modest amounts, and many arbitration provisions offer to pay them for the consumer if requested or unconditionally. *Id.* § 2, pp. 58-59; § 5, pp. 12, 76-77.

11 *Id.* § 4, p. 10.

12 *See* https://www.jamsadr.com/consumer-minimum-standards/.

13 Study, § 5, pp. 13, 41. Consumers were also awarded attorneys' fees in 14.4% of the disputes resolved by arbitrators; the largest award of consumer attorneys' fees was $37,275. *Id.* § 5, p. 79.

14 *Id.*, § 1, pp. 16-17.

putative class member's recovery. The Study further found that attorneys' fees awarded to class counsel in settlements during the period studied amounted to $424,495,451.[15]

In addition, the Study concluded that in 87% of the 562 class actions the CFPB studied, the putative class members received no benefits whatsoever because they were settled individually (61%) or reached no result while the Study was ongoing (26%).[16] Moreover, according to the Study, only 13% of the class actions studied obtained final class settlement approval.[17] And, in the class settlements that required the putative class members to submit a claim form, the weighted average claims rate was only 4%, meaning that 96% of the potentially eligible putative class members failed to obtain any benefits because they did not submit claims.[18] Even those minuscule claims rates fell by 90% if documentary proof was required to be submitted along with the claim.[19]

The Study also showed that consumers are more likely to obtain decisions on the merits in arbitration than in class action litigation. None of the 562 class actions studied by the CFPB went to trial.[20] By contrast, the Study found that of 341 cases resolved by an arbitrator, in-person hearings were held in 34% of the cases, and an arbitrator issued an award on the merits in about one-third of the cases.[21]

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15 *Id.* § 8, p. 33.

16 Proposed rule, 81 FR 32847, 32908 n. 604.

17 *Id.*

18 Study, § 1, p. 17, § 8, p. 30.

19 *Id.* § 8, p. 31.

20 *Id.* § 6, pp. 7, 38.

21 *Id.* § 5, pp. 11-12.

The CFPB's findings mirror the conclusions reached by the U.S. Chamber of Commerce, Institute for Legal Reform in a December 2013 empirical study of class actions titled "Do Class Actions Benefit Class Members?"[22] After analyzing 148 putative consumer class action lawsuits filed in or removed to federal court in 2009, the Chamber's report found, *inter alia*, that:

- None of the class actions ended in a final judgment on the merits for the plaintiffs or even went to trial, either before a judge or a jury.

- The vast majority of cases produced no benefits to most members of the putative class – although in a number of those cases the lawyers who sought to represent the class were paid substantial amounts.

- Over one-third (35%) of the class actions that were resolved were dismissed voluntarily by the plaintiff. Many of those cases settled on an individual basis, meaning a payout to the named plaintiff and the lawyers who brought the suit, even though the class members received nothing.

- Just under one-third (31%) of the class actions that were resolved were dismissed by a court on the merits, meaning that class members received nothing.

- For those cases that settled, there was often little or no benefit for class members.

B. <u>Searle Consumer Arbitration Study</u>

A March 2009 study of AAA consumer arbitrations undertaken by the Searle Civil Justice Institute, Northwestern University School of Law, reviewed 301 AAA consumer arbitrations (240 brought by consumers, 61 brought by businesses) that were closed by award between April and December 2007. It reached the following conclusions: (a) the upfront cost of arbitration for consumer claimants was quite low; (b) AAA consumer arbitration is expeditious (an average of 6.9 months); (c) consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed); (d) no statistically significant

[22] *See* http://www.instituteforlegalreform.com/resource/study-class-actions-benefit-lawyers-not-consumers/.

repeat-player effect favoring the company was identified; and (e) arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574. *See* Christopher R. Drahozal, *et al*., "An Empirical Study of AAA Consumer Arbitration," 25 Ohio St. J. on Disp. Resolution 843 (2010).

C. Harris Interactive Poll

In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the U.S. Chamber of Commerce, Institute for Legal Reform.[23] The survey was conducted online among 609 adults who had participated in a binding arbitration case (voluntarily, due to contract language or with strong urging by the Court, but not a court order) that reached a decision. The major findings were:

(1) Arbitration was widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court.

(2) Two-thirds (66%) of participants said they would be likely to use arbitration again with nearly half (48%) saying they are extremely likely.

   a. Even among those who lost, one-third said they are at least somewhat likely to use arbitration again.

(3) Most participants were very satisfied with the arbitrator's performance, the confidentiality of the process and its length.

(4) Predictably, winners found the process and outcome very fair and the losers found the outcome much less fair. However, 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome.

(5) While one in five of the participants were required by contract to go to arbitration, the remainder were voluntary – suggested by one of the parties, one of the lawyers, or the court.

(6) Two-thirds of the participants were represented by lawyers.

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[23] *See* https://www.instituteforlegalreform.com/uploads/sites/1/ArbitrationStudyFinal.pdf.

BRIEF BACKGROUND OF THE FAA

The FAA was enacted in 1925 to overcome a long-entrenched judicial hostility towards arbitration, and it established a liberal federal policy favoring arbitration that is applicable in both federal and state courts. Ever since then, arbitration has played a special role in resolving disputes between consumers and companies. The importance of arbitration as an alternative to court litigation for resolving disputes, including disputes between a consumer and a company, is reflected in hundreds of judicial opinions that define and refine the role played by arbitration in American society. The Supreme Court alone has issued more than 40 significant opinions dealing with arbitration.

Section 2 of the FAA, 9 U.S.C. §2, provides that:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Thus, by its plain terms, the FAA makes enforceable both pre-dispute arbitration agreements ("a controversy thereafter arising") as well as post-dispute arbitration agreements ("an existing controversy"). Countless millions of consumer arbitration agreements have been entered into in reliance on this language, creating a body of settled expectations among companies and consumers alike.

The application of the FAA to consumer transactions increased significantly during the past two decades, due largely to United States Supreme Court rulings which confirmed that parties are as free to enter into arbitration agreements as they are to enter into any other type of

contract, even though some states purported to prohibit pre-dispute arbitration agreements and some courts refused to enforce them. The Supreme Court held that:

- The FAA creates a body of federal substantive law of arbitrability which is applicable to arbitration agreements in contracts involving interstate commerce. *Perry v. Thomas*, 482 U.S. 483, 489 (1987).
- Interstate commerce is to be interpreted broadly. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ("[w]e have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce' -- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power").
- The FAA "revers[ed] the longstanding judicial hostility to arbitration agreements … and place[d] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987).
- Federal law strongly favors the arbitration of disputes and requires that courts rigorously enforce arbitration agreements. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
- State laws that directly or indirectly undermine enforcement of the terms of private arbitration agreements or that single out arbitration for special treatment are preempted by the FAA. *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct 1321 (2017); *AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333 (2011); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

- "Congress, when enacting this law [the FAA], had the needs of consumers, as well as others, in mind …." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995);
- The FAA "ensur[es] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 479 (1989).

But the FAA does not totally displace state law. Section 2 of the FAA reserves to the state and federal courts the authority to invalidate or restrict arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." Therefore, generally applicable state law contract defenses such as lack of assent and unconscionability can be asserted by consumers who believe that a pre-dispute arbitration agreement should not be enforced. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

CONSUMER ARBITRATION AGREEMENTS ARE DRAFTED FAIRLY

The existing system of "checks and balances" works well because the vast majority of financial services companies draft arbitration agreements that are intended to be fair to consumers. Over the course of time, consumer arbitration agreements have evolved from short one-paragraph general provisions to multi-page detailed agreements filled with consumer-friendly features which make arbitration more beneficial to the consumer than court litigation.

My partners and I routinely counsel clients to draft arbitration agreements that contain the following provisions, among others:

1. Give Consumer the Unconditional Right to Reject Arbitration. To ensure that consumers have truly "agreed" to arbitrate, and are not "forced" to do so, we strongly advise companies to give consumers the unconditional right to reject the arbitration provision within a reasonable period of time after they enter into the contract and to prominently disclose that right. Scores of federal and state courts, in enforcing consumer arbitration agreements, have emphasized the fairness inherent in providing an opt-out right and held that such agreements are not contracts of adhesion or procedurally unconscionable. *See, e.g., Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Pivoris v. TCF Financial Corporation*, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); *Providian National Bank v. Screws*, 2003 Ala. LEXIS 298 (Ala. Oct. 3, 2003); *Tsadilas v. Providian Nat'l Bank*, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004).

In addition, there is abundant competition in the financial services marketplace to accommodate consumers who prefer not to arbitrate. The CFPB Study found that 85% of credit card issuers covering 47% of the market and 92.3% of banks with 56% of insured deposits do not include arbitration provisions in their consumer contracts.[24] Clearly, consumers who prefer not to have an arbitration provision in their account agreement are free to choose companies that have not implemented arbitration programs.

2. Require the Arbitrator to Apply Applicable Substantive Law, Including Fee-Shifting Statutes Which Give the Consumer the Right to Recover His or Her Counsel Fees If He or She Prevails in the Arbitration. We uniformly counsel companies to specify in their arbitration clauses that the arbitrator must apply applicable substantive law and award the same remedies (including punitive damages and equitable relief) that would be available

[24] Study, § 1, pp. 9-10; § 2, pp. 7, 9, 14.

to the consumer had the matter proceeded in an individual action in court. In particular, our arbitration agreements preserve the consumer's right to recover attorneys' fees and costs from the company if provided by applicable law. (Most federal and state consumer protection statutes require such fee-shifting). That way, the consumer does not lose the benefit of any statutory remedies such as treble damages or fee-shifting by proceeding to arbitration. In some cases, our clients even agree to bear the consumer's legal costs if the consumer prevails, even if the governing statute does not require the company to bear such costs.

3. Avoid "Carve-Outs" from Arbitration that Unilaterally Favor the Company, and Permit Small Claims Court Actions. The arbitration agreement, as a matter of fairness, should operate to bind both the company and the consumer. In addition, both the AAA and JAMS require that the consumer be given the option of bringing suit against the company in small claims court for disputes that are within its jurisdiction.

4. Neutral Arbitration Administrator. Virtually all companies implementing arbitration on a widespread basis choose to utilize the services of a national arbitration organization with established rules and infrastructure. The major national administrators are the AAA and JAMS. Companies use established arbitration organizations because: (a) it is more efficient administratively; (b) courts are already familiar with the major organizations and their arbitration clauses have frequently been subjected to judicial scrutiny and interpretation; and (c) the organizations have adopted standard procedural rules which specify the mechanics of the arbitration process, the selection of arbitrators, and other procedural requirements. We advise companies to identify more than one arbitration administrator in the arbitration agreement and then give the consumer the right to choose which organization to use.

5. **Arbitration Costs**. We generally counsel companies to provide in their arbitration clauses that if the consumer requests, the company will pay all or substantially all of the consumer's arbitration filing, administrative and hearing fees and not seek to recover them even if the consumer loses. Some companies provide that the company will "advance" the consumer's arbitration costs, and let the arbitrator determine at the end who should ultimately be responsible, subject to the proviso that in no event will the consumer be responsible for more than what his or her court costs would have been had the matter been litigated in court.

6. **Location of Hearing**. Our arbitration agreements provide that any hearing will be in a location near the consumer's residence so that the consumer is not burdened with traveling a long distance or incurring extra costs.

7. **Disclosures**. We always advise companies to make sure that the principal differences between arbitration and litigation are clearly and conspicuously explained to the consumer in the arbitration agreement and related contract documents. We also counsel them to highlight the fact that the consumer has the right to reject the arbitration provision without any adverse effect on his or her account. Companies do value their customers' business and want them to make an informed choice.

Notably, the CFPB, which studied hundreds of consumer arbitration clauses during the course of its empirical Study, found that the vast majority of the arbitration agreements in use today in fact do incorporate consumer-friendly features such as those described above. As stated by the CFPB:

- "[M]ost of the arbitration agreements contained a small claims court 'carve-out,' permitting either the consumer or both parties to file suit in small claims court."[25]

[25] CFPB, Proposed arbitration rule, 81 FR 32842 (May 24, 2016).

- A "number of arbitration provisions … allowed consumers to 'opt out' or otherwise reject an arbitration agreement.[26]

- "Most arbitration agreements reviewed in the Study contained provisions that had the effect of capping consumers' up front arbitration costs at or below the AAA's maximum consumer fee thresholds."[27]

- "[M]ost … arbitration agreements contained provisions requiring or permitting hearings to take place in locations close to the consumer's place of residence."[28]

- "[M]ost of the arbitration agreements the Bureau studied contained disclosures describing the differences between arbitration and litigation in court. Most agreements disclosed expressly that the consumer would not have a right to a jury trial, and most disclosed expressly that the consumer could not be a party to a class action in court …. The Study found that this language was often capitalized or in boldfaced type."[29]

THE MAJOR NATIONAL ARBITRATION ADMINISTRATORS HAVE ADOPTED STANDARDS AND PROCEDURES THAT ENSURE FAIRNESS TO CONSUMERS

The most widely used national arbitration administrators, the AAA and JAMS, have committed themselves in writing to protecting the rights of consumers to a fair arbitration.

For example, the AAA has adopted a Consumer Due Process Protocol that must be complied with by companies which wish to use the AAA as an arbitration administrator. Numerous consumer advocates and governmental groups were members of the Advisory Committee that formulated the Protocol. The Protocol was adopted by the AAA in April 1998 to ensure that arbitration agreements between consumers and the companies they deal with are endowed with "fundamental fairness."[30] The AAA has also adopted Consumer Arbitration Rules

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26 *Id.*

27 *Id.*

28 *Id.*

29 *Id*.

30 See http://www.adr. org/sp.asp?id=22019. An empirical study of the AAA's enforcement of its Consumer Due Process Protocol found that "the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those

for use in arbitrations between consumers and businesses and a special schedule of arbitration fees that caps the fee to the consumer on a claim of $10,000 or less at $200. All other arbitration fees are paid by the company.[31] An impoverished consumer can also apply to the AAA for a waiver of all arbitration costs. JAMS has analogous due process standards and rules.[32] Justice Ruth Bader Ginsburg characterized such provisions limiting the consumer's fees in arbitration as a "model[] for fair cost and fee allocation." *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., concurring).

COURTS RIGOROUSLY PROTECT CONSUMERS FROM UNFAIR ARBITRATION AGREEMENTS

The FAA itself ensures that if a company attempts to enforce an arbitration agreement that the consumer believes is unfair, a court will hear the parties and determine whether the agreement is enforceable. Pursuant to Sections 3 and 4 of the FAA, 9 U.S.C. §§3, 4,[33] the court

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clauses with protocol violations." The study concluded: "Our findings support the proposition that private regulation by the AAA complements existing public regulation of the fairness of consumer arbitration clauses. Any consideration of the need for future legislative action should take into account the effectiveness of this private regulation." *See* Christopher R. Drahozal and Samantha Zyontz, *Private Regulation of Consumer Arbitration* (August 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904545.

31 *See* https://www.adr.org/sites/default/files/document_repository/Consumer_Rules_Web_1.pdf

32 *See* http://www.jamsadr.com/rules-consumer-minimum-standards.

33 Those sections provide, respectively, as follows:

> "Section 3. Stay of proceedings where issue therein referable to arbitration
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> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such

suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

"Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

typically determines the existence, enforceability and scope of the arbitration agreement. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 94 (2002) (court determines whether a particular dispute falls within the scope of an arbitration clause and whether the clause is enforceable); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (court determines "the validity of the arbitration clause [and] its applicability to the underlying dispute between the parties").

Federal and state courts have proven to be an effective backstop for arbitration agreements that are found to impair the consumer's substantive rights, impose unreasonable costs on the consumer, are one-sided in favor of the company or are otherwise unfair to the consumer. *See, e.g., ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (arbitration agreement exempted collection proceedings brought by lender against consumer from arbitration and cost of arbitration would be ten times the cost of court action); *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166 (W.D. Wash. 2002) (company, but not consumer, reserved right to go to court rather than arbitrate); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (agreement limited damages in cases of fraud and other intentional torts and imposed thousands of dollars in arbitration fees); *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 857 N.E.2d (2006) (contract did not inform customer of the costs of arbitration and did not provide a cost-effective means for resolving the claim).

Thus, there is presently a time-tested and effective system in place to hear consumers' complaints about arbitration clauses and independently determine whether an arbitration should take place. To the extent courts have declined to enforce an arbitration agreement, that shows that the system is working. It should not be viewed as an indictment of all

consumer arbitration agreements, the vast majority of which are fair to consumers, comply with federal and state law and are enforced by the courts.

DISPELLING COMMON MISCONCEPTIONS ABOUT CONSUMER ARBITRATION

Although it has been repeatedly endorsed by the United States Supreme Court as an economical and effective way to resolve consumer disputes, some plaintiffs' lawyers and consumer advocacy groups remain wary of arbitration and (to use the vernacular) have given it a "bad rap." The final section of this memorandum dispels those misconceptions.

A. Arbitration Is Not a Barrier to Class Actions

It is sometimes argued that arbitration is a barrier to class actions because it imposes individual resolution of claims and/or dissuades class actions from being brought. However, substantial data in the CFPB's Study strongly contradicts that argument. The Study found that arbitration was a factor in only 8% of the 562 class actions studied by the CFPB.[34] Thus, in 92% of the class actions studied by the CFPB, arbitration was not even a factor. That is because the defendant companies moved to compel arbitration in only 94 of the 562 class actions (16.7%), and those motions were granted in only 46 (one-half) of the class actions.[35] Accordingly, arbitration had no causal effect whatsoever on 92% of the class actions studied by the CFPB and, therefore, could not have been a barrier to consumers obtaining class relief.[36] This data is particularly remarkable since in 2011, the middle of the time period studied (2010-2012), the United States Supreme Court upheld the validity of class action waivers in consumer arbitration agreements in

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34 Study, § 6, p. 38 ("[a]ll claims against a company party were stayed or dismissed for arbitration in 8% of the [class] cases").

35 *Id.* pp. 8-9, 57-58.

36 *Id.* § 1, p. 14.

AT&T Mobility, LLC v. Concepcion, *supra*. The Study found that while *Concepcion* generated a "slight upward trend" in the use of arbitration provisions, "the increase has not been as dramatic as predicted by some commentators."[37]

Moreover, the Study clearly showed that the vast majority of class actions fail, not because the underlying disputes are sent to arbitration for individual disposition, but because they inherently lack merit and/or are not certifiable. The Study found that 61% of the class actions studied were settled individually.[38] Thus, "[t]he most common outcome was a potential non-class settlement (typically, a withdrawal of claims by the plaintiff) …. Classwide judgment for consumers … [was] the least frequent of the identified outcomes …, occurring in less than 1% of cases."[39] The Study further found that "[c]lass certification rarely occurred outside the context of class settlement" and "[n]o class cases went to trial."[40] These statistics strongly suggest that the bulk of the so-called "class actions" studied were one-off disputes that did not involve systemic issues and/or were otherwise not meritorious or certifiable.[41] They buttress the conclusion that there is little, if any, causal relationship between the success of consumer class actions and the presence of arbitration clauses in the consumers' contracts, since most class actions fail due to their own inadequacies entirely unrelated to arbitration.

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37 *Id.* § 2, p. 12.

38 Proposed rule, 81 FR 32847, 32908 n. 604.

39 Study, § 6, p. 37.

40 *Id.* § 1, p. 14.

41 A U.S. Chamber of Commerce study concluded that more than 90% of consumer claims involve highly individualized disputes that are not eligible for class action treatment because they do not implicate systemic conduct. *See* https:// www.instituteforlegalreform.com/uploads/sites/1/2016_8_22_ Chamber_ Arbitration_ Comment_Letter.pdf.

This data from the Study also debunks the argument that the mere presence of an arbitration clause discourages or inhibits consumers from pursuing remedies. *See, e.g.*, "Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements," Docket No. CFPB-2012-0017, p. 17 (June 23, 2012) (urging the CFPB to study "the claims suppression effects of arbitration clauses"). Even assuming *arguendo* that there are class actions that are not brought because the potential plaintiffs' contracts contained an arbitration clause with a class action waiver, there is no reason to believe that such class actions, if brought, would have a better success rate than the ones that were filed and studied by the CFPB. Presumably, 87% of those class actions would never have resulted in any relief to putative class members, less than 1% of them would result in a judgment for the plaintiffs and the relief afforded to the average putative class member in the 13% of class actions that settle ($32.35) would be paltry compared to the benefits obtainable in arbitration ($5,389 average arbitration award).

Furthermore, many of the federal consumer protection statutes being heavily litigated today (e.g., Telephone Consumer Protection Act, Fair Credit Reporting Act) are filed by non-customers who are not subject to any contract with the consumer financial services providers, let alone an arbitration provision,. Thus, the existence of an arbitration agreement with customers can have no deterrent effect on non-customers initiating class actions.

B. Class Actions Are Not Needed to Facilitate Small Dollar Consumer Claims

Critics of arbitration often argue that class actions are superior to individual arbitration because they provide a vehicle by which consumers can prosecute small claims. The underlying premise of that argument is that consumers cannot find an attorney to prosecute a small individual claim but will find an attorney to bring a class action. Nevertheless, there is statistical proof that consumers are able to find attorneys to represent them on an individual basis in small

dollar claims where the consumer, if successful, can recover attorneys' fees and costs. The overwhelming majority of Truth in Lending Act ("TILA") lawsuits filed each year are individual, not class action, lawsuits, even though the vast majority of suits involve small dollar claims[42] and class actions are permitted under TILA. TILA permits successful plaintiffs to recover their attorneys' fees and costs. 15 U.S.C. §1640(a). According to computer searches of the LexisNexis CourtLink® database, between 2002 and 2011, 93% to 98% of all TILA claims brought in the federal courts were brought as individual actions, rather than class actions:

Year	**TILA Individual Actions**	**TILA Class Actions**
2002	539 (94% of total)	37 (6% of total)
2003	474 (93% of total)	39 (7% of total)
2004	554 (97% of total)	20 (3% of total)
2005	473 (97% of total)	19 (3% of total)
2006	671 (98% of total)	17 (2% of total)
2007	665 (95% of total)	40 (5% of total)
2008	733 (94% of total)	51 (6% of total)
2009	1,320 (97% of total)	40 (3% of total)
2010	928 (98% of total)	17 (2% of total)
2011	539 (98% of total)	15 (2% of total)

[42] TILA provides for statutory damages, typically ranging from $100 to $2,000, plus actual damages and attorneys' fees. 15 U.S.C. §1640(a). Actual damages are nearly impossible to prove because plaintiffs must show detrimental reliance. *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001) (citing cases), *cert. denied*, 534 U.S. 820 (2001).

Statutory fee-shifting provides an incentive for an attorney to represent the plaintiff in an individual action even in small dollar cases. And, many federal consumer protection statutes in addition to TILA also allow a prevailing plaintiff to recover attorneys' fees. *See, e.g.*, Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a); Fair Credit Billing Act, 15 U.S.C. § 1640(a); Credit Repair Organizations Act, 15 U.S.C. § 1679g(a); Fair Credit Reporting Act, 15 U.S.C. §§ 1681n and 1681o; Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d). Since most consumer arbitration agreements in use today, and the leading arbitration administrators such as the AAA and JAMS require applicable substantive law to be applied in consumer arbitrations, such an attorney incentive would also apply to TILA and similar statutory claims resolved through individual arbitrations rather than individual court proceedings.[43]

In addition, there are many examples of non-TILA cases in which a sizeable attorneys' fee was awarded even though the plaintiff's individual recovery was relatively small. *See, e.g., Dee v. Sweet*, 218 Ga. App. 18, 460 S.E.2d 110 (1995) (awarding $258,360 in attorneys' fees and $1.00 in actual damages); *Ex parte Edwards*, 601 So. 2d 82 (Ala. 1992) ($43,000 in attorneys' fees regarding $2,544 note); *Johnson v. Eaton*, 958 F. Supp. 261, 264 (M.D. La. 1997) ($13,410 fee award, nearly 27 times damage award); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ($20,000 attorney fee; $0 actual damages and $100 of statutory damages). *See also* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 Vand. L. Rev. 729, 772 (2006) ("[C]ourts should take into account the applicability of fee shifting statutes in determining whether a claim is economical to bring in arbitration …. The prospect of a fee recovery may make even a case seeking small monetary damages attractive to an attorney.

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[43] Moreover, as discussed above, many arbitration agreements, by contract, allow a prevailing consumer to recover attorneys' fees even if statutory law does not so provide.

Thus, in evaluating the amount at stake in arbitration (and thus whether the claim is economical to bring), a court must consider not only the damages sought by the claimant but also any possible attorneys' fee recovery.").

C. Class Actions Are Not Needed to Deter Corporate Wrongdoing

Contrary to the arguments of critics of arbitration, class actions are not needed to deter corporate wrongdoing. There are numerous governmental regulatory agencies – *e.g.*, the CFPB, the FTC, the FCC, the Comptroller of the Currency, the SEC and state attorneys' general – which actively enforce consumer protection laws and deter companies from wrongdoing. Government enforcement actions, the threat of such actions and rules encouraging financial institutions to self-report, remediate, and modify practices not only protect those who may be unaware of any alleged harm, but they also modify corporate behavior. Moreover, enforcement actions impact not just the subject of the action, but all financial service providers. Being the subject of an enforcement action, especially as it is quickly, widely, and repeatedly circulated through social media forums and the press, serves to publicly "shame" companies into compliance and deters unlawful and questionable conduct.

Nor are class actions necessary to make consumers aware of the existence of a claim due to the role played in modern society by the internet and social media in alerting consumers to alleged corporate misconduct. Consumers frequent internet "gripe sites" and learn almost immediately of alleged corporate wrongdoing by news going "viral" on the internet. Moreover, websites and databases maintained by federal and state government enforcement agencies encourage consumers to submit their complaints, which help educate other consumers to particular issues and potential claims.

D. The Number of Consumer Arbitrations Initiated to Date Is Not a Meaningful Statistic

In its Study the CFPB noted the "relatively low" number (1,847) of arbitration proceedings filed by consumers against financial services companies, compared to court cases.[44] However, no inference should be drawn that consumers prefer litigation to arbitration or that arbitration is an ineffective remedy compared to class actions. In reality, the vast majority of consumer disputes are resolved by informal methods without the need for arbitration or litigation (even small claims litigation). Such procedures include error and dispute resolution procedures provided by federal and state law, customer complaint mechanisms maintained internally by businesses, such as toll-free customer complaint telephone numbers and website "contact us" links, as well as procedures such as complaint portals offered by regulatory agencies, state agencies and private organizations such as the Better Business Bureau to help consumers resolve disputes with businesses.

In particular, most financial services companies maintain internal complaint resolution programs which, unlike class actions, can address consumer disputes quickly and efficiently. Financial services providers are driven to support robust complaint resolution systems by the desire and need to satisfy customers in order to survive in a competitive environment. And in today's world, where stories and complaints may be quickly and widely broadcast through the press and social media, companies have powerful incentives to resolve disputes fairly and quickly, especially small dollar disputes. Banks, in particular, have additional incentives to support strong complaint management systems and ensure complaints are resolved fairly because of the emphasis given to complaints in the examination process.

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[44] Study, § 5, p. 9.

Other reasons the number of consumer arbitrations is relatively small in comparison with court filings include the facts that: (a) many plaintiffs' lawyers and consumer advocates have sent consistently negative messages about arbitration for almost two decades and have done their best to dissuade consumers from arbitrating,[45] (b) consumer arbitration is still "the new kid on the block" compared to litigation,[46] (c) vigorous governmental enforcement actions eliminate the need for consumers to bring private actions[47]; (d) individuals are turning increasingly to on-line arbitration and mediation resources to resolve small-dollar customer complaints;[48] and (e) government agencies have failed to educate consumers about the many benefits that arbitration can offer as opposed to litigation.

E. Companies Do Not Have an Unfair Advantage in Arbitration Because They Are "Repeat Players"

It is sometimes alleged that some companies have an unfair advantage in arbitration because they appear more frequently than any particular consumer. That myth was debunked by the CFPB in its Study. The Study found that almost all of the arbitration proceedings involved

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45 For example, the consumer advocacy organization Public Justice stated on its website that "[o]ur Mandatory Arbitration Abuse Prevention Project is the acknowledged national leader in the battle against corporate efforts to use arbitration …." *See* http://www.publicjustice.net/what-we-do/access-justice/mandatory-arbitration.

46 *See* Prepared Remarks of then-CFPB Director Cordray at the March 10, 2015 Arbitration Field Hearing, p. 1 (although the Federal Arbitration Act was passed in 1925, "[a]rbitration clauses were rarely seen in consumer financial contracts until the last twenty years or so").

47 The CFPB Study identified 1,150 consumer financial enforcement actions filed between 2008 and 2012 by state, municipal and federal entities. Of those, only 15% had one or more matching class action litigations. Study, § 9, p. 14.

48 For example, Modria, Inc. has helped companies and consumers resolve millions of disputes through on-line claims resolution procedures. *See* https://www.tylertech.com/products/modria.

companies with repeat experience in the forum. However, that was counter-balanced by the fact that counsel for the consumers were also usually repeat players in arbitration.[49] Notably, in 81% of the arbitrations in which consumers were awarded affirmative relief, the company was a "repeat player" but the consumer prevailed anyway.[50]

F. Arbitration Furthers the Important Public Policy of Reducing Overcrowding in the Courts

While consumer advocacy groups sometimes argue that arbitration is against public policy, just the opposite is true. Arbitration furthers the important public policy of reducing the ever-increasing backlogs in federal and state court systems. More than 30 years ago, Chief Justice Burger urged greater use of arbitration to reduce "the backlog of cases in the overburdened federal and state courts." "Protracted cases," he emphasized, "not only deny parties the benefits of a speedy resolution of their conflicts, but also enlarge the costs, tensions and delays facing all other litigants waiting in line." "In terms of cost, time and human wear and tear, arbitration is better by far," Chief Justice Burger concluded.[51] Class actions are the epitome of "protracted cases," to which Chief Justice Burger referred. Data from the CFPB Study confirmed that class actions can last for two years or more, compared to arbitration proceedings which are initiated and concluded in a matter of months.[52]

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49 *Id.* § 1, p. 12; § 5, p. 10 & n. 16.

50 *Id.* § 5, p. 67.

51 *See* "Burger Urges Greater Use of Arbitration to Reduce Court Backlog" (Aug. 21, 1985), available at http://www.apnewsarchive.com/1985/Burger-Urges-Greater-Use-of-Arbitration-to-Reduce-Court-Backlog/id-a294b2e9e054f20b9c5b0ec9dc39dd73.

52 Study, § 1, p. 13; § 6, pp. 9, 43.

Things have become dramatically worse during the three decades since Chief Justice Burger made his observations about the benefits of arbitration. A 2014 report on New York federal and state courts concluded that "[d]elays at every stage of every matter before the courts are now common: delays in getting into the courthouses, delays in processing documents, delays in the public's ability to obtain archived documents, delays in trial proceedings, delays in decisions."[53] Likewise, another report co-authored in 2014 by the former Chief Justice of the Minnesota Supreme Court observed:

> Citizens turn to our state courts when their lives are in crisis. But after years of underfunding, many state courts are unable to timely deliver the justice our citizens seek, and to which they are entitled …. Budget cuts in many states … have required court systems to lay off staff, reduce court hours, close or consolidate courts in some instances, and give priority to criminal cases that require [compliance with] speedy trial rules. This has resulted in significant delays in resolving civil cases in jurisdictions where court funding has been cut. Delayed resolution through lack of judicial funding inflicts widespread economic harm. Because of uncertainty in the outcome of a pending trial or even a trial date, for that matter, businesses are reluctant to add employees, expand product lines, or invest in capital equipment all of which affects the vitality of the local economy.[54]

The burdens courts face is further reflected in the statistics reported by the Administrative Office of the U.S. Courts, which found that the number of pending federal district court cases has risen from 370,067 in 2013 to 427,512 as of March 31, 2016.[55] Accordingly, consumer arbitration benefits not only consumers and businesses, but the general public at large.

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53 Task Force on Judicial Budget Cuts, Co-Chairs: Hon. Stephen G. Crane and Michael Miller, Report on Public Hearing Conducted on December 2, 2013, Executive Committee of the New York County Lawyers' Association (Jan. 2014).

54 E.J. Magnuson, *et al.*, "The Economics of Justice," pp. 1-2 (DRI 2014).

55 Administrative Office of U.S. Courts, Federal Court Management Statistics, District Courts, p. 1 (Mar. 31, 2016).

G. Active-Duty Servicemembers and Their Dependents Are Exempt from Arbitration in Most Financial Services Contracts

The present system of arbitration does not impact most financial services contracts entered into by active-duty servicemembers and their dependents. The Military Lending Act ("MLA") prohibits the use of arbitration agreements in most consumer credit contracts entered into by active-duty servicemembers and their dependents. Since 2007, creditors have been prohibited by the MLA from including arbitration agreements in contracts for consumer credit extended to active-duty service members and their dependents where the credit is a closed-end payday loan with a term of 91 days or less in which the amount financed does not exceed $2,000, a closed-end vehicle title loan with a term of 181 days or less, or a closed-end tax refund anticipation loan.

In 2015, the Department of Defense adopted a final rule that extended the MLA's protections to a host of additional products, including credit cards, installment loans, private student loans and federal student loans not made under Title IV of the Higher Education Act, and all types of deposit advance, refund anticipation, vehicle title, and payday loans. The rule applies to transactions or accounts consummated or established after October 3, 2016 for most products, and credit card accounts consummated or established after October 3, 2017.

CONCLUSION

For all of the foregoing reasons, it is my opinion that the rights of consumers are well protected by the FAA as presently enacted, by companies' careful drafting of arbitration agreements, by the due process procedures and rules used by the leading national arbitration administrators and by the enforcement capabilities of the federal and state courts.

Thank you for your consideration of my views.