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## KCON XI ESSAY

# “WHAT WE LOSE IN SALES, WE MAKE UP IN VOLUME”: THE FAULTY LOGIC OF THE FINANCIAL SERVICES INDUSTRY’S RESPONSE TO THE CONSUMER FINANCIAL PROTECTION BUREAU’S PROPOSED RULE PROHIBITING CLASS ACTION BANS IN ARBITRATION CLAUSES

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### I. INTRODUCTION

While much disagreement exists about whether mandatory arbitration

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clauses should be used in consumer and employment contracts,<sup>1</sup> there is one thing on which both consumer advocates and corporate representatives agree upon: mandatory arbitration is enormously controversial.<sup>2</sup> Arbitration is a hot-button issue because it removes lawsuits from the civil justice system, which it replaces with a private justice system that is secret. This private justice system does not have to follow judicial rules of discovery, civil procedure, or evidence, does not require written opinions, has limited appeal rights, and is susceptible to claims of bias in favor of corporate repeat players and against consumers and employees.<sup>3</sup>

One of the most controversial aspects of mandatory arbitration is its potential to virtually eliminate aggregate litigation, such as class actions.<sup>4</sup> Particularly in the area of consumer financial services—such as banking, credit cards, and lending agreements—virtually every company that imposes a mandatory arbitration clause on its customers also includes a provision barring the customer from participating in a class action or any other joint proceeding.<sup>5</sup> It is hardly surprising that companies would want to prevent consumers from bringing large-scale lawsuits. Class action bans can stop consumer protection in its tracks.<sup>6</sup> Because much corporate misbehavior in the consumer arena involves standard practices that inflict small injuries

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1. See, e.g., Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 532–35 (2014) [hereinafter Frankel, *The Arbitration Clause*] (discussing the conflicts between mandatory arbitration and preventing clients from getting fair time in court).

2. See Frank Z. LaForge, Note, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 Tex. L. Rev. 225, 225 (2005) (citing Charles L. Knapp, *Taking Contracts Private, The Quiet Revolution in Contract Law*, 71 Fordham L. Rev. 761, 763 (2002)) (asserting the enforceability of arbitration agreements as arguably the most litigated contractual issue facing the courts today).

3. See Frankel, *The Arbitration Clause*, *supra* note 1, at 551–52 (discussing the arguments for and against mandatory arbitration).

4. See F. PAUL BLAND, JR. ET AL., NAT'L CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS § 6.7.5.1, at 176–77 (7th ed. 2015), *updated at* [www.nclc.org/library](http://www.nclc.org/library) (noting the increase by large companies using arbitration clauses to “prohibit individuals from joining together as a class” and suing them for claims that would be too small to bring on their own).

5. The Consumer Financial Protection Bureau (CFPB) conducted the most thorough study to date of arbitration clauses in the consumer financial services market. It found that “[a]lmost all of the arbitration agreements studied prohibit arbitration from proceeding on a classwide basis.” SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS, CONSUMER FIN. PROT. BUREAU: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 10 (2015).

6. See F. PAUL BLAND, JR. ET AL., *supra* note 4, at 177 (“[B]y attempting to prevent him from seeking class relief, Defendant has essentially foreclosed the possibility that Plaintiff may obtain *any* relief. . . . On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws.” (quoting *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1219–21 (N.M. 2008))).

on a large number of people,<sup>7</sup> class actions are well-suited for protecting consumers from misconduct that allows corporations to inflict repeated violations that add up to millions of dollars in ill-gotten gains.<sup>8</sup> Similarly, the small stakes for each consumer mean that individual claims often will not be brought because it is not worthwhile to go through the trouble of a filing a claim, either in court or arbitration. Consequently, class action bans have been described as immunity provisions or “get out of jail free” cards for corporations.<sup>9</sup>

Defenders of class action bans, however, respond that the class action system is broken and imposes huge costs on companies while providing little or no benefit to consumers.<sup>10</sup> These costs then can be passed on to consumers in the form of higher prices.<sup>11</sup> Advocates of class action bans also claim that class actions impose unnecessary and time-consuming procedural complexities that drag cases out for years for no good reason.<sup>12</sup> By contrast, they claim that individualized arbitration offers a faster,

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7. See Richard Cordray, CFPB Dir., Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing (Oct. 7, 2015), (transcript available at <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007> [hereinafter Cordray, Prepared Remarks]) (“Many violations of consumer financial law involve relatively small amounts of money for the individual victim. Group claims are often the only effective way consumers can pursue meaningful relief for harms that can add up to large amounts of money for financial providers.”); see also F. PAUL BLAND, JR. ET AL., *supra* note 4, at 176 (noting the need for class actions due to the pervasiveness of small injuries to multiple individuals by large companies).

8. See F. PAUL BLAND, JR. ET AL., *supra* note 4, at 176–77 (explaining how class actions allow these individuals a method of recovery that would otherwise be denied to them because their individual claims, separately, are not large enough to bring a cause of action).

9. *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002); see David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 242 (2012) (“Nothing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational.”).

10. See Eric J. Mogilnicki, *The CFPB’s Flawed Case for Banning Class Action Waivers*, LAW360 (July 13, 2016), [www.law360.com/articles/8159711/print?section=banking](http://www.law360.com/articles/8159711/print?section=banking) (arguing the CFPB’s report on the cost of the class action regime, while already expensive, is still a conservative estimate). See generally Am. Bankers Ass’n et al., Comment Letter on the CFPB’s Proposed Arbitration Rule (Aug. 22, 2016), <http://www.aba.com/Advocacy/commentletters/Documents/joint-trades-arbitration-comment-letter.pdf> [hereinafter Am. Bankers Ass’n et al., Comment Letter on Proposed Arbitration Rule] (discussing the financial burden a rule against class action bans would have on public companies, consumers, and the court system).

11. See Am. Bankers Ass’n et al., Comment Letter on Proposed Arbitration Rule, *supra* note 10, at 3 (“As customers of the providers, [the consumers] will be saddled with higher prices and/or reduced services, because the billions of dollars in additional class action litigation costs will be passed through to them in whole or in part.”).

12. See *id.* at 6–7 (asserting that the court system is overburdened and that case resolution is substantially delayed).

cheaper, and more efficient alternative to class litigation.<sup>13</sup>

Prior to 2011, many courts struck down arbitration class action bans as unfairly depriving consumers of their ability to vindicate their rights.<sup>14</sup> In 2011, however, the United States Supreme Court held in *AT&T Mobility LLC v. Concepcion*,<sup>15</sup> that the Federal Arbitration Act (FAA) prohibited states from striking down class action bans on public policy grounds.<sup>16</sup> As a result, only the federal government can act to address class action bans in arbitration clauses. Recently, the Consumer Financial Protection Bureau (CFPB), the agency Congress created in response to the 2008 financial crisis, did just that.<sup>17</sup> In May 2016, the CFPB issued a proposed rule that would bar companies that provide consumer financial services products<sup>18</sup> from using arbitration clauses that include a class action ban.<sup>19</sup>

The rule has drawn praise from both academic and consumer advocacy groups.<sup>20</sup> Not surprisingly, it has received heavy criticism from the financial services industry.<sup>21</sup> The industry has put forth many arguments against the rule.<sup>22</sup> One of its most dramatic arguments—and one that the industry has

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13. *Id.* at 11.

14. *See* *Discover Bank v. Super. Ct. of L.A.*, 113 P.3d 1100, 1103 (Cal. 2005) (deciding class action bans are unfair to consumers and unjustly benefit corporations), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Kinkel v. Cingular Wireless LLC* 857 N.E.2d 250, 275 (Ill. 2006) (deciding that the Federal Arbitration Act is only preempted if an arbitration clause is found to be unconscionable); *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 769 (Mass. 2009) (determining arbitration clauses that were deemed unconscionable are severed from the contract, but do not deem the entire agreement to be unconscionable); *Muhammad v. Cty. Bank of Rehoboth Beach*, 912 A.2d 88, 100–01 (N.J. 2006) (claiming arbitration clauses could be severed from the contract if the court deemed the clause to be unconscionable), *superseded by* Federal Arbitration Act, 9 U.S.C. § 2 (2012 & Supp. 2015); *McKee v. AT&T Corp.*, 191 P.3d 845, 857 (Wash. 2008) (en banc) (holding arbitration clauses in contracts are void if they are found to be unconscionable).

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

16. *Id.* at 351.

17. *Arbitration Agreements*, 81 Fed. Reg. 32,830, 32,830 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) [hereinafter *Arbitration Agreements*].

18. The CFPB's regulatory authority extends only to the financial services arena. *Dodd–Frank Wall Street Reform & Consumer Protection Act*, 12 U.S.C. § 5518(a)–(b) (2012 & Supp. 2015). Thus, any rules it enacts would not prevent companies that offer other services from continuing to use class action bans.

19. *Arbitration Agreements*, *supra* note 17, at 32,830.

20. *See* Public Citizen, Comment Letter In the Matter of Arbitration Agreements 2 (Aug. 22, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003> (discussing the benefits of the CFPB's proposed rule); *see also* Hal Abramson et al., Comment Letter of 210 Law Professors and Scholars on the CFPB's Proposed Rule 1 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003> (arguing for the new CFPB regulation which would bar corporations from placing bans on class actions).

21. *See* Am. Bankers Ass'n et al., Comment Letter on Proposed Arbitration Rule, *supra* note 10, at 2–3 (criticizing the proposed arbitration rule as unnecessarily harsh).

22. *See id.* at 3–5 (arguing the CFPB's proposed rule will discourage settlements and encourage

repeatedly made since the CFPB first began to study arbitral class action bans—is its assertion that ending the use of class action bans will end consumer arbitration altogether.<sup>23</sup> Simply put, many in the financial services industry predict that if companies cannot use arbitration as a means of banning class actions, they will not use arbitration at all. Instead, financial services companies will walk away.<sup>24</sup>

This is a bold assertion, and one that merits closer scrutiny.<sup>25</sup> This Essay undertakes that examination and suggests that the industry's arguments about why it would exit arbitration lack support and are likely more rhetorical than real. Rather, the argument is more likely a scare tactic designed to discourage the CFPB from prohibiting the use of class action bans. But if it is true that the industry would prefer the lack of arbitration over having arbitration without class action bans, that is more troubling than if the industry is just engaging in hyperbole designed to give pause to federal regulators. It would show that the industry's preference for arbitration is built on claim suppression. It would also show that industry likes arbitration when arbitration stops consumers from bringing claims, but that once the industry is faced with the possibility of actually having to arbitrate claims with real stakes, it prefers to go to court. If anything, this represents just another reason to support the CFPB's proposed rule than to oppose it.<sup>26</sup>

## II. THE STAKES OVER THE CLASS ACTION BAN

Consumer and industry advocates are up in arms about the continued existence of class action bans in arbitration clauses. Arbitration advocates tout that arbitration provides a faster, cheaper, and more flexible alternative to litigation, with its drawn out discovery, formal procedures, and appellate review.<sup>27</sup> Similarly, the Supreme Court has indicated that arbitration

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drawn out litigation).

23. *See id.* at 11 (claiming the proposed rule will ban arbitration entirely because it is so strict).

24. *See infra* notes 82–86 and accompanying text.

25. Professor Jeff Sovern has looked into the industry's claim that many companies would stop using arbitration clauses if class action bans were prohibited and has suggested that the argument indicates financial services companies are more interested in insulating themselves from accountability than they are in using arbitration as an alternative to litigation. *See* Jeff Sovern, *CFPB Arbitration Plan Provokes Dubious Industry Claims*, AM. BANKER (Nov. 13, 2015), <http://www.americanbanker.com/bankthink/cfpb-arbitration-plan-provokes-dubious-industry-claims-1077814-1.html> (explaining how the CFPB's arbitration plan would backfire by leading many companies to stop using clauses if the ban was allowed since arbitration is more efficient for both parties than litigation).

26. For the interest of full disclosure, I have signed comments to the CFPB supporting its proposed rule. *See* Abramson et al., *supra* note 20, at 14 (agreeing amongst all 210 professors and scholars that the CFPB's proposed rule is beneficial to consumers).

27. *See* Am. Bankers Ass'n et al., Comment Letter on the CFPB's Consumer Arbitration Study 2

represents a switch from one forum to another, not a waiver of a party's substantive rights:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>28</sup>

But that notion of simply switching a dispute from a judicial forum to an arbitral forum without giving up substantive rights falls once a class action ban is added to the arbitration clause. With a class action ban, there is no realistic alternative to litigation. That is because the cases that are best addressed by class actions are not feasible as individual claims.<sup>29</sup> As the Supreme Court has long recognized:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.<sup>30</sup>

Much (though certainly not all) corporate wrongdoing against consumers involves the infliction of small individual injuries across individuals.<sup>31</sup> While each individual may suffer a small injury, a company can reap millions of dollars in illegal profits from its misconduct.<sup>32</sup>

Without class actions, many consumers who are victims of corporate wrongdoing will be unable to effectively vindicate their rights. This is true

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(July 13, 2015), <http://consumerbankers.com/sites/default/files/July%2013%202015%20Consumer%20Arbitration%20Study%20Comment%20Letter.pdf> [hereinafter *Am. Bankers Ass'n et al., Comment Letter on Arbitration Study*] (asserting arbitration is faster and less expensive than class litigation).

28. *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

29. *See Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)); *see also* *Sovern*, *supra* note 25 (“Because consumer claims are often for small amounts and the cost of arguing cases is high, many consumer disputes can affordably be decided only in class actions.”).

30. *Amchem Products, Inc.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (asserting that class actions allow for people to obtain justice which they would not have received if they brought their cases individually).

31. *See* Cordray, Prepared Remarks, *supra* note 7 (estimating that class action bans in the financial services sector alone deny relief to tens of millions of individual consumers).

32. *Id.*

for two reasons. First, the individually small stakes make individual actions infeasible or impractical.<sup>33</sup> Second, many consumers may not even realize that they have been cheated or mistreated.<sup>34</sup> Those individuals therefore would not bring an individual action because they would not know that they had a claim in the first place. However, such individuals could be part of a class action that would provide them with a remedy or that would require a misbehaving corporation to change its behavior.

As a result, arbitral class action bans can effectively immunize corporations from accountability for their wrongdoing. Courts have described class action bans as a “get out of jail free” card for corporations.<sup>35</sup> Richard Cordray, the Director of the CFPB, stated that class action bans give companies a “free pass” and allow them to duck their legal obligations to consumers.<sup>36</sup>

Companies that use class action bans in their mandatory arbitration clauses take a different view. They do not necessarily deny that a class action ban can make it more difficult for consumers to vindicate their rights, though they do suggest that individualized arbitrations are more feasible than consumer advocates suggest.<sup>37</sup> However, they argue that the class action system is so broken and expensive that a world without class actions is better than a world with them, even if that means that consumers cannot always obtain a remedy.<sup>38</sup> They assert that many class actions do not provide any meaningful benefit to consumers, that the high stakes involved pressure companies to settle questionable claims, and that the high costs of class action litigation are passed on to consumers in the form of higher prices.<sup>39</sup> They also claim that even if consumers cannot bring class actions,

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33. *See* *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of \$15 to \$30. . . . The *realistic* alternative . . . is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”); Cordray, Prepared Remarks, *supra* note 7 (“Many violations of consumer financial law involve relatively small amounts of money for the individual victim. Group claims often are the only effective way consumers can pursue meaningful relief for harms that can add up to large amounts of money for financial providers.”).

34. Arbitration Agreements, *supra* note 17, at 32,857.

35. *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002).

36. *See* Cordray, Prepared Remarks, *supra* note 7 (stressing the problems with class action bans by giving corporations an unfair advantage).

37. *See* Am. Bankers Ass'n et al., Comment Letter on Arbitration Study, *supra* note 27, at 12–13 (pointing out that the CFPB's study of consumer finance arbitrations found that consumers brought 1,847 individual claims in arbitration between 2010 and 2012).

38. *See* Am. Bankers Ass'n et al., Comment Letter on Proposed Arbitration Rule, *supra* note 10, at 9 (discussing the problems with class action systems versus arbitration with regard to cost and expediency).

39. *See* Am. Bankers Ass'n et al., Comment Letter on Arbitration Rule, *supra* note 11.

state and federal government agencies and attorneys general can bring administrative enforcement actions on behalf of their citizens.<sup>40</sup>

The impact of class action bans is hard to understate. By one measure, in the financial services sector alone, the use of class action bans has enriched corporations by more than half a billion dollars per year. The CFPB, in a comprehensive study of arbitration provisions in consumer financial services contracts, found that consumers who initiated individual arbitrations in the years 2010–2011 received total relief of \$172,433, and \$189,107 total debt forbearance.<sup>41</sup> By contrast, during the period of 2008–2012, the study found that class actions involving financial services products provided total relief of \$540 million per year to an average of seventy million consumers a year.<sup>42</sup> Moreover, that number does not account for the additional value of any injunctive relief those class actions provided.<sup>43</sup> The amounts awarded in individual arbitrations are a pittance compared to the amounts paid out in class actions. If companies can eliminate class actions,

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40. This claim seems questionable at best. While government agencies can bring actions against some companies, they have limited resources and cannot police all abuses. *See Discover Bank v. Super. Ct. of L.A.*, 113 P.3d 1100, 1110 (Cal. 2005) (holding that government enforcement actions are not an adequate substitute for private class actions), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *see also* Brief of *Amicus Curiae* Attorney General of Washington in Support of Appellants at 4–5, *Scott v. Cingular Wireless LLC*, 161 P.3d 1000 (Wash. 2007) (No. 77406-4), 2006 WL 811763 (arguing class actions further a legitimate public interest that should be protected, stating “private consumer action[s] [are] a vital feature” of Washington’s Consumer Protection Act, and explaining that the Washington Legislature specifically amended the state’s Consumer Protection Act to create a private right of action so that private parties could aid the state in protecting consumers from illegal conduct). For example, the CFPB found in its arbitration study that there was very little overlap between the enforcement actions brought by administrative agencies and consumer class actions. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 1.4.8, at 17–18 (2015) [hereinafter CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS] (discussing the benefits to consumer class actions and why they should be protected by the government). In other words, private class actions were filling in the gaps left by agencies based on their limited resources. Moreover, state legislatures, when enacting consumer protection statutes, have expressly recognized that state governments are not sufficient on their own and that they want to encourage private parties to act as private attorneys general and supplement the actions of state governments by bringing their own actions. *See Marshall v. Miller*, 276 S.E.2d 397, 402 (N.C. 1981) (explaining North Carolina’s legislature adopted its consumer protection law to encourage “private enforcement”); *Scott*, 161 P.3d at 1006 (explaining that the Washington Legislature specifically amended the state’s Consumer Protection Act (CPA) to permit private enforcement and finding “[p]rivate actions by private citizens are now an integral part of CPA enforcement”).

41. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.3, at 11–13.

42. *See id.* § 1.4.7, at 16 (stating “the annual average of the aggregate amount of the settlements was \$540 million per year[.]” identifying the estimated class membership size as being 350 million across five years, and implying that if class action settlements were done away with, then companies would be half a billion dollars richer every year).

43. *See infra* notes 71–73 and accompanying text.

they can hold on to another \$500 million or more per year that would otherwise go to injured consumers. In the words of one lawyer who advocates for consumers, prohibiting class action bans is “the single most transformative thing the [CFPB] can do to level the playing field for consumers.”<sup>44</sup>

Just as consumer and industry representatives are divided about the legitimacy of class action bans, state and federal courts also were divided, at least prior to 2011. Because class action bans effectively eliminate consumer claims, consumers challenged the enforceability of class action bans in court in a number of states, arguing that they were unconscionable or a violation of public policy under state law.<sup>45</sup> Although courts were divided, many struck down class action bans on the ground that they deprived consumers of a meaningful remedy for their wrongdoing.<sup>46</sup>

In 2011, however, consumers’ efforts to use the courts to block enforcement of class action bans came to a grinding halt. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA preempted a California rule prohibiting enforcement of class action bans.<sup>47</sup> In doing so, the Court took away the power of courts and state legislatures to require the availability of class procedures.<sup>48</sup> As a result, only the federal government retains authority to regulate class action bans in arbitration clauses.<sup>49</sup> Hence,

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44. Ben Seal, *Lawyers Predict Litigation ‘Avalanche’ from Class-Action Waiver Ban*, LEGAL INTELLIGENCER (June 10, 2016), <http://www.thelegalintelligencer.com/id=1202759840093/Lawyers-Predict-Litigation-Avalanche-From-ClassAction-Waiver-Ban?slreturn=20160825183938> (quoting consumer attorney Deepak Gupta).

45. See F. PAUL BLAND, JR. ET AL., *supra* note 4, § 6.7.5.1, at 177 (noting the success consumers had in striking down class action bans as unconscionable).

46. Compare *Discover Bank v. Super. Ct. of L.A.*, 113 P.3d 1100, 1108 (Cal. 2005) (finding some class action bans unenforceable), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 257 (Ill. 2006) (declaring class action waivers enforceable on a case-by-case basis), *Feeny v. Dell, Inc.*, 908 N.E.2d 753, 765 (Mass. 2009) (declining to enforce a prohibition on class actions in a consumer contract), *Muhammad v. Cty. Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006) (holding a class-arbitration waiver unconscionable), *superseded by Federal Arbitration Act*, 9 U.S.C. § 2 (2012 & Supp. 2015), and *McKee v. AT&T Corp.*, 191 P.3d 845, 858 (Wash. 2008) (en banc) (holding the class action waiver to be unconscionable), *with Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 878 (11th Cir. 2005) (enforcing a class action ban). See *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (enforcing a class action ban, stating the arbitration clause did not oppress or leave the plaintiffs without remedy enough to be unconscionable); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638–39 (4th Cir. 2002) (rejecting the arguments that the arbitration agreement was unenforceable because it was unconscionable, and “that forcing consumers . . . to arbitrate consumer protection claims against [financial services] companies . . . is against public policy relating to consumer protection”).

47. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

48. See *id.* at 344 (“Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”).

49. See, e.g., *id.* at 357 (holding the FAA preempts the California rule which classifies the majority

the CFPB's decision whether or not to regulate the use of class action bans has taken on that much more significance.

### III. THE CFPB AND ITS ACTIONS RELATING TO ARBITRATION

The CFPB was born in response to the financial crisis that reached its height in 2007–2008.<sup>50</sup> Congress reacted to these new economic conditions by enacting the Dodd–Frank Act in 2010, and as part of that act, Congress created the Bureau.<sup>51</sup> Congress gave the agency authority to regulate businesses that provide consumer financial services, such as banking, lending, mortgage, and student loan services.<sup>52</sup>

Congress also gave the CFPB authority to study and regulate the use of mandatory arbitration clauses by companies providing consumer financial services. It directed the Bureau to conduct a study and provide a report to Congress concerning “the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.”<sup>53</sup> It then gave the Bureau authority to issue regulations that “may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties.”<sup>54</sup>

Congress placed two conditions on the Bureau's regulatory authority. First, the Bureau can impose limits on mandatory arbitration only if it determines that any such limit “is in the public interest and for the protection of consumers.”<sup>55</sup> Second, the Bureau's findings in support of its regulations must be consistent with the results of its statutorily mandated

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of class waivers in consumer contracts as unconscionable because “it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

50. *Creating the Consumer Financial Protection Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Feb. 26, 2017).

51. See Dodd–Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111–203, § 1028, 124 Stat. 1376, 2003–04 (2010) (codified at 12 U.S.C. § 5518) (establishing the duties of the newly created Bureau).

52. See *Creating the Consumer Financial Protection Bureau*, *supra* note 50 (“The agency would also have responsibility for supervision and enforcement with respect to the laws over providers of consumer financial products and services that escaped regular [f]ederal oversight.”).

53. Dodd–Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111–203, § 1028, 124 Stat. 1376, 2003–04 (2010) (codified at 12 U.S.C. § 5518).

54. *Id.* at 2004.

55. *Id.*

study of arbitration clauses.<sup>56</sup>

The Bureau spent several years studying the use of arbitration clauses by financial services companies and preparing its report for Congress. In December 2013, it delivered a 168-page preliminary report that described its findings to date and offered the opportunity for interested parties to comment and to provide additional information to the Bureau.<sup>57</sup> In March 2015, the Bureau reported its final study to Congress.<sup>58</sup> That study made several findings supporting the claim that class action bans are widespread in consumer financial services contracts and that they insulate companies from being held accountable for their wrongdoing.<sup>59</sup>

First, it found that arbitration clauses are widespread in the financial services sector. More than 53% of all credit card deposits and 58% of insured bank deposit from the 103 largest banks were governed by contracts with arbitration clauses.<sup>60</sup> In other sectors, the prevalence of arbitration clauses was much greater.<sup>61</sup> More than 83% of storefront payday loan contracts, prepaid payment card contracts, student loan contracts, and mobile wireless contracts contained arbitration clauses.<sup>62</sup> All told, tens of millions of consumers are subject to an arbitration clause in one contract or another.<sup>63</sup> These results are consistent with other smaller studies showing that class action bans are almost universal in consumer arbitration clauses.<sup>64</sup>

Second, nearly all of these arbitration clauses banned class actions. In the six product markets that the CFPB studied, class action bans were imposed in more than 85% of contracts with arbitration agreements covering 99% of the market share across those markets.<sup>65</sup> The result is that a consumer who

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56. *Id.* at 2003–04.

57. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(a) STUDY RESULTS TO DATE (2013) [hereinafter CONSUMER FIN. PROT. BUREAU, PRELIMINARY RESULTS].

58. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1, at 2.

59. *Id.* § 1.4.1–1.4.3 at 9–12.

60. *Id.* §§ 1.4.1, 2.3 at 10, 7–8.

61. *See id.* § 2.3, Table 1 at 8 (providing statistics on arbitration clause prevalence in different markets).

62. *Id.* § 2.3 at 7–8.

63. *See id.* §§ 1.4.1, 2.3 at 9, 7–8 (“Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.”).

64. *See generally* Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008) (conducting a study of arbitration clauses in which every arbitration clause between a business and a consumer contained a class action ban).

65. *See* CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.1, at 10 (“Nearly all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis.”).

has a dispute with a financial services company would most likely be required to arbitrate that dispute, and to do so on an individual basis only.

Third, the Bureau made findings indicating that class action bans create a substantial impediment to relief for consumers and thus insulate financial services providers from accountability for misconduct. It found that even though tens of millions of consumers were subject to arbitration clauses, consumers filed an average of only 411 arbitrations per year.<sup>66</sup> Most of those claims involved higher dollar amounts where individual claims are more practicable.<sup>67</sup> With respect to claims of \$1,000 or less—the type of small dollar claim that class actions are designed to preserve—only twenty-five individual arbitrations were filed per year.<sup>68</sup> The total amount of relief for the tens of millions of consumers subject to arbitration clauses in 2010–2011 amounted to \$172,433.<sup>69</sup>

By contrast, the Bureau found consumer class actions in 2008–2012 provided settlements that dwarfed the amount provided in arbitration. The amount of cash settlements in class actions averaged \$540 million per year.<sup>70</sup> That amount does not include additional injunctive relief to consumers where companies changed their practices in response to class action settlements.<sup>71</sup> Such injunctive relief provides benefits to all consumers, not just the specific members of the class. The Bureau provided several examples of substantial, valuable injunctive relief resulting from class action settlements.<sup>72</sup> Although defenders of class action bans assert that class actions provide no meaningful relief to consumers and merely enrich their attorneys, the Bureau also provided several examples where consumers received substantial cash payments totaling tens of millions of dollars.<sup>73</sup>

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66. *Id.* § 1.4.3 at 11.

67. *See id.* § 1.4.3 at 12 (“The average consumer affirmative claim amount in arbitration filings with affirmative consumer claims was around \$27,000.”).

68. *Id.* § 1.4.3 at 12. Some scholars have reached the same conclusion. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2804 (2015) (“The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not as a vindication but as an unconstitutional evisceration of statutory and common law rights.”).

69. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.3, at 12.

70. *Id.* § 1.4.7 at 16.

71. *See id.* (noting the figure represents a floor).

72. *See, e.g.*, Arbitration Agreements, *supra* note 17, at 32,858 (citing *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010)) (describing a case in which a litigation settlement required Wells Fargo to change its overdraft practices throughout the United States).

73. *See* CONSUMER FIN. PROT. BUREAU, PRELIMINARY RESULTS, *supra* note 57, § 4.8.2 at 104–08 for a list of cases where consumers received substantial cash payments. For example, in the *In re Checking Account Overdraft Litigation* class action, five million class members received \$61 million in cash

Based on these and other findings, the Bureau recently issued a proposed rule to address class action bans.<sup>74</sup> The rule would prohibit financial services companies from including class action bans in their arbitration clauses.<sup>75</sup> The rule also requires financial services companies to provide the CFPB with certain data regarding their use of arbitration.<sup>76</sup>

#### IV. THROWING OUT THE BABY WITH THE BATHWATER

The CFPB's proposed rule has provoked a huge public response.<sup>77</sup> As of August 15, 2016, a week before the deadline for public comments, the Bureau had already received more than 8,380 public comments.<sup>78</sup> Not surprisingly, financial services companies and organizations representing those companies have staunchly opposed any limitation on the use of class action bans.<sup>79</sup> Ever since the CFPB released its preliminary results, financial services organizations have critiqued the Bureau's findings and accused the Bureau of having an anti-arbitration agenda.<sup>80</sup> The industry stepped up its attacks when the CFPB stated in October 2015 that it was considering whether to propose a rule prohibiting class action bans.<sup>81</sup>

Perhaps seeing no other alternative, the industry invoked the nuclear option. It has vociferously and repeatedly asserted that if the CFPB

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relief and injunctive relief valued at an additional \$52 million. CONSUMER FIN. PROT. BUREAU, PRELIMINARY RESULTS, *supra* note 57, § 4.8.2 at 108–09 (citing *In re* Checking Account Overdraft Litig., 694 F. Supp. 2d 1032 (S.D. Fla. 2010)).

74. *See* Arbitration Agreements, *supra* note 17, at 32,830 (“[T]he proposed rule would prohibit covered providers of certain consumer financial products and services from using an [arbitration] agreement with a consumer . . . to bar the consumer from filing or participating in a class action with respect to covered consumer financial product or service.”).

75. *Id.*

76. *Id.* at 32,830–31.

77. *See* Lisa Lambert, *Battle Against Forced Arbitration in Financial Contracts Could Take Years*, INS. J. (Aug. 22, 2016), <http://www.insurancejournal.com/news/national/2016/08/22/423994.htm> (“[T]housands of angry consumers and business representatives have flooded the Consumer Financial Protection Bureau with comments on its May proposal to block companies from forcing customers to take disputes to arbitration instead of joining group lawsuits.”).

78. *Id.* As of the date this Essay went to press, that number had risen to 66,495 comments. The total number of comments received, which the agency updates daily can be found at *Arbitration Agreements*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=CFPB-2016-0020> (last visited Feb. 26, 2017).

79. *Arbitration Agreements*, *supra* note 78.

80. *See, e.g.*, Letter from David Hirschmann, President & Chief Exec. Officer, Cent. for Capital Mkts. Competitiveness, U.S. Chamber of Commerce, & Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, U.S. Chamber of Commerce, to Monica Jackson, Consumer Fin. Prot. Bureau 2 (Dec. 11, 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/2013\\_12.11\\_CFPB\\_-\\_arbitration\\_cover\\_letter.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf) (expressing dissatisfaction with the Bureau's study and implying that the CFPB has a biased agenda).

81. *See infra* notes 82–86 and accompanying text.

prohibits class action bans, then financial services companies will stop using arbitration clauses and will walk away from arbitration altogether. A sampling of comments from different industry organizations and representatives follows:

- “[M]any companies have publicly stated that they would abandon arbitration entirely if the class-action waivers contained in their arbitration agreements are rendered unenforceable.”<sup>82</sup>
- “[I]f the CFPB moves forward with regulating arbitration agreements, many companies will likely abandon arbitration altogether[.]”<sup>83</sup>
- “[T]he Consumer Financial Protection Bureau’s proposed plan on class action waivers in consumer arbitration agreements will cause companies to abandon arbitration completely.”<sup>84</sup>
- “If [class action] waivers are not permitted, I think most companies will abandon the use of arbitration altogether.”<sup>85</sup>
- “The proposed rule also threatens to have an adverse impact on consumers because arbitration is likely to disappear almost entirely if class action waivers are eliminated.”<sup>86</sup>

There is some support for the idea that the industry would prefer to abandon arbitration than simply forgo using class action bans. As the Bureau found in its study, most of the arbitration clauses it examined contained an anti-severability clause.<sup>87</sup> This type of anti-severability clause states that if the class action ban is found to be unenforceable, then the whole arbitration clause will be stricken.<sup>88</sup> The industry’s use of such clauses could be read to indicate that without the option of a class action ban, financial services companies would prefer to litigate than to arbitrate.

At the same time, the industry’s assertion that it would abandon

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82. Letter from David Hirschmann to Monica Jackson, *supra* note 80, at 55.

83. *ACA Denounces CFPB’s Effort to Ban Arbitration As Evidence of Unbalanced Regulation*, ACA INT’L (Oct. 15, 2015), <http://www.acainternational.org/cfpbarticle-aca-members-participate-in-sbrefa-panel-to-discuss-arbitration-rulemaking-37366.aspx>.

84. Alan Kaplinsky, *Industry’s Preference for Arbitration Is a Reality*, AM. BANKER (Nov. 20, 2015), <http://www.americanbanker.com/bankthink/industrys-preference-for-arbitration-is-a-reality-1077919-1.html>.

85. Seal, *supra* note 44 (relating Alan Kaplinsky’s statement).

86. Am. Bankers Ass’n et al., Comment Letter on Proposed Arbitration Rule, *supra* note 10, at 4.

87. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.1, at 10.

88. *Id.*; see also *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469–71 (2015) (describing and interpreting an anti-severability clause used by DIRECTV which stated in part: “[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [the arbitration section] is unenforceable”).

arbitration seems puzzling. After all, financial services companies try to justify their use of arbitration clauses by arguing that arbitration is faster, cheaper and more efficient than litigation for individual cases.<sup>89</sup> As others have pointed out, if that's true, industry should continue to prefer to use arbitration over litigation for individual disputes.<sup>90</sup>

Most of the time, industry groups have simply asserted that companies would abandon arbitration if the CFPB prohibits class action bans without providing any detailed explanation for why they would do so. However, two different rationales have appeared in some industry comments. Both rationales rest on the assumption that the financial benefits of arbitration would disappear if class action bans disappear.

First, some commenters have suggested it is too expensive for companies to deal with two different dispute resolution systems—judicial and arbitration.<sup>91</sup> According to this view, companies say they would never resolve class claims in arbitration because it is too risky for them.<sup>92</sup> If they were going to deal with class claims in court, then they would rather deal with all claims in court so that they would only be dealing with a single dispute resolution mechanism.<sup>93</sup> Having to organize and manage two different dispute resolution systems creates added expenses that companies would prefer to avoid.<sup>94</sup>

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89. See CONSUMER FIN. PROT. BUREAU, PRELIMINARY RESULTS, *supra* note 57, § 1.1 at 8 (stating that “defenders of pre-dispute arbitration clauses take the view that arbitration offers ‘a faster, more efficient and more cost-effective method of resolving disputes than court litigation’” (citation omitted)).

90. See *Sovern*, *supra* note 25 (“But if the industry truly believes that arbitration is so much better than litigation at resolving disputes, shouldn’t it prefer arbitration to litigation for resolving individual disputes, where there is not a threat of a class action?”).

91. CFPB Publishes Long-Awaited Proposed Rule Precluding Class-Action Waivers in Arbitration Agreements, STROOCK & STROOCK & LAVAN 2 (May 5, 2016), <http://www.stroock.com/siteFiles/Publications/CFPBPublishesLongAwaitedProposedRule.pdf>

92. See *id.* (“[I]ndustry spokespersons have made clear that very few financial services companies will accept the risk of class arbitration . . .”); see also *supra* notes 82–86 and accompanying text.

93. Commentary, *supra* note 91, at 2.

94. See Christopher L. Allen et al., CFPB Takes Latest Step Toward Limiting Use of Pre-Dispute Arbitration Agreements for Consumer Financial Products and Services, ARNOLD & PORTER KAYE SCHOLER 3 (Oct. 19, 2015), [http://www.apks.com/~media/files/perspectives/publications/2015/10/cfpb-takes-latest-step-toward-limiting-use-of-pr\\_/files/newsletter-item/fileattachment/adv19oct2015\\_cfpbtakeslateststep.pdf](http://www.apks.com/~media/files/perspectives/publications/2015/10/cfpb-takes-latest-step-toward-limiting-use-of-pr_/files/newsletter-item/fileattachment/adv19oct2015_cfpbtakeslateststep.pdf) (“In addition, companies may decide to abandon arbitration clauses altogether to avoid developing costly compliance systems equipped to handle multiple avenues of dispute resolution.”); see also Ashley Nicole Baker, CFPB Anti-Arbitration Rule Gives Millions to Class Action Lawyers, Leaves Consumers in the Dust, FREEDOMWORKS (May 18, 2016), <http://www.freedomworks.org/content/cfpb-anti-arbitration-rule-gives-millions-class-action-lawyers-leaves-consumers-dust> (“Following the enactment of this regulation, companies start spending huge amounts of money defending against class action suits. The cost-benefit of arbitration would change and companies would eventually abandon the entire process.”).

Second, some industry groups have suggested that arbitration is not profitable without the class action ban.<sup>95</sup> Industry advocates claim that individual arbitration is essentially a loss leader for financial services companies. They claim that companies lose money on individual arbitrations because many companies pay all of the filing fees and costs of arbitration or an outsized share of the costs.<sup>96</sup> Consumer arbitrations can have filing fees of as much as \$1,700 and the parties must also pay for the arbitrator's time, which could run from as little as \$750 to as much as \$1,500 per arbitrator per day.<sup>97</sup> But companies are willing to endure this purported financial hardship of arbitration in exchange for the financial benefits of avoiding class actions.<sup>98</sup>

The industry's claim that companies will walk away from arbitration in the absence of a class action ban is a bold one. If the industry wants the Bureau to consider and rely on its assertions when deciding whether to issue a rule, then those arguments should receive close scrutiny. As explained below, one should be skeptical about whether either rationale is true and whether they more likely reflect an attempt to scare the CFPB away from issuing a rule. But if the industry is correct that arbitration is financially feasible only by eliminating exposure to class actions or other aggregate litigation, that is even more troubling than if its assertions are false. If it is true, that would indicate that arbitration only works by taking away the rights of the millions of consumers who would otherwise be members of class

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95. See Am. Bankers Ass'n et al., Comment Letter on Proposed Arbitration Rule, *supra* note 10, at 12 ("The costs [of class action litigation] are unprecedented and staggering.").

96. See *id.* ("Many, if not most, financial services providers anticipate they would abandon arbitration altogether, since the cost both of subsidizing individual arbitrations and the cost of defending the anticipated onslaught of consumer class actions would be prohibitive."); see also Letter from Am. Banker Ass'n et al., to Monica Jackson, Office of the Exec. Sec'y., Consumer Fin. Prot. Bureau 2 (Aug. 22, 2016), <http://consumerbankers.com/cba-issues/comment-letters/joint-trades-letter-cfpb-re-notice-proposed-rulemaking-arbitration> (expressing concern that the proposed rule, "while not *directly* banning pre-dispute arbitration, would have the practical effect of eliminating arbitration as an option for consumers because it will be uneconomic for companies to continue subsidizing arbitration for their customers if the Bureau forces them to bear the massive expenses associated with class action litigation").

97. CONSUMER ARBITRATION RULES, r. 33–34 (AM. ARBITRATION ASS'N 2016).

98. See Letter from Am. Banker Ass'n et al. to Monica Jackson, *supra* note 96, at 2 ("[M]any companies presently offer subsidized arbitration programs for their customers: they pay the customer's filing fee, most of the discovery and other costs, and some even pay a 'bonus' to customers who prevail in arbitration."); Letter from David T. Hirschmann, President and Chief Exec. Officer, Cent. for Capital Mkts. Competitiveness, U.S. Chamber of Commerce, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau 2 (May 2, 2016), <https://cfpbmonitor.ballardspahrblogs.com/wp-content/uploads/sites/5/2016/05/05-02-2016-Letter-from-D-Hirschmann-to-Dir-Cordray-re-arbitration-fie.pdf> (asserting that most companies pay for consumers to bring claims in arbitration and that arbitration is virtually free for the consumer).

action lawsuits, and who would otherwise benefit from the cash and injunctive relief those cases bring. If industry is willing to trade the financial loss of individual arbitrations for the gain of widespread claim suppression, then maybe it would not be such a bad thing if industry chose to abandon arbitration altogether.

## V. SCRUTINIZING INDUSTRY'S RATIONALES

I am skeptical of both proffered rationales for industry's supposed abandonment of arbitration if class action bans are eliminated. I believe the industry is employing a scare tactic to try and dissuade the CFPB from banning class actions. However, if industry really would abandon arbitration if the class action waiver disappeared, that fact merely underscores that industry uses arbitration to suppress claims rather than to resolve them. If that is the case, then causing industry to give up arbitration and go back to resolving disputes in court would benefit consumers and society and should be encouraged.

### A. *Maintaining Dual Compliance Regimes*

As stated above, some in the financial services industry have argued that if class actions go to court, they would prefer to have all claims go to court because it is too expensive to maintain two separate systems for dispute resolution.<sup>99</sup> This claim rests on the assumption that companies do not currently utilize two different dispute resolution systems. They either address all disputes in arbitration or all disputes in court; but they cannot afford to address some disputes in arbitration and others in court.

That assumption is almost certainly false. First, companies already maintain multiple dispute resolution systems. Companies have relationships with many entities and individuals, not just consumers. And while many companies use arbitration clauses in their contracts with consumers, they use arbitration clauses much less frequently in their contracts with other companies.<sup>100</sup> One study of twenty-one publicly traded companies found that more than three-quarters of those companies used arbitration clauses in their consumer contracts, but that fewer than 10% of their non-consumer, non-employment contracts contained arbitration clauses.<sup>101</sup>

Second, many companies that use arbitration clauses explicitly carve out

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99. *See supra* notes 91–94 and accompanying text.

100. *See* Eisenberg et al., *supra* note 64, at 883 (“[T]he large companies in our data overwhelming selected arbitration as the method for resolving consumer disputes and permitted litigation as the method for resolving business [to business] disputes.”).

101. *Id.* at 884 (2008).

certain claims from their arbitration clauses and reserve them for judicial resolution.<sup>102</sup> While carve-outs may only cover a small subset of possible claims, carve-outs are a common feature of arbitration clauses.<sup>103</sup> In fact, a wealth of litigation has sprung up over the use of “non-mutual” arbitration clauses—clauses that require individuals to arbitrate the claims that they are most likely to affirmatively bring while exempting the types of claims that corporations are most likely to bring against individuals, such as debt collection claims.<sup>104</sup> Companies therefore are purposely writing their arbitration clauses to maintain two different dispute resolution systems: one for the claims covered by the arbitration clause, and another for the claims carved out by the arbitration clauses.

In the consumer financial services context, a common carve-out is one that permits either party to bring claims of \$1,500 or less in small claims court rather than in arbitration.<sup>105</sup> In its study, the CFPB found that most of the arbitration clauses it reviewed contained a small claims carve-out.<sup>106</sup> In several product markets, small claims carve-outs were included in 80–93% of arbitration clauses.<sup>107</sup> Interestingly, the CFPB found that corporations were much more likely to bring claims against consumers in small claims court than consumers were to bring claims in small claims court

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102. See Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1956 (2014) (explaining how companies use “carve-outs” with “varying frequency across a number of different contracting contexts”); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 450–51 (2010) (listing examples of when companies will use arbitration and when they will use litigation); Donald Lee Rome & David M.S. Shaiken, *Arbitration Carve-Out Clauses in Commercial and Consumer Secured Loan Transactions*, AM. ARB. ASS'N, Aug.–Oct. 2006, at 2 (explaining why carve-outs are useful in certain contexts).

103. See Drahozal & O'Connor, *supra* note 102, at 1950 (describing carve-outs as a widespread “phenomenon” with “varying frequency” across different contexts).

104. See, e.g., F. PAUL BLAND, JR. ET AL., *supra* note 4, §§ 6.7.3.1–3.5, at 165–70 (analyzing how various courts have ruled on the issue of conscionability with regards to non-mutual arbitration clauses); Richard Frankel, *Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 242–44 (2014) [hereinafter Frankel, *Concepcion and Mis-Concepcion*] (discussing legal challenges to non-mutual arbitration clauses).

105. See *Arbitration Agreements*, *supra* note 17, at 32,835 n.71 (“[M]ost arbitration agreements in consumer financial contracts contain a ‘small claims court carve-out’ that provides the parties with a contractual right to pursue a claim in small claims court.” (quoting CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 2.5.2, at 33)).

106. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.6, at 15 (“Most arbitration clauses that we reviewed contained small claims court carve-outs.”).

107. *Id.* § 2.5.2 at 33. More specifically, 93% of payday loan arbitration clauses, 85% of mobile wireless arbitration clauses, 83% of private student loan arbitration clauses, 59% of checking account arbitration clauses, and 66.7% of credit card arbitration clauses contained small claims court carve outs. *Id.*

against companies.<sup>108</sup> In the jurisdictions it studied, consumers brought 870 small claims actions in 2012 while corporations brought 41,000 small claims actions, almost all of which were debt collection actions.<sup>109</sup> In short, it is the financial services providers—the same entities that say that they will abandon arbitration without class action bans rather than use different dispute resolution mechanisms—that are creating a dual dispute resolution system by repeatedly invoking small claims court to collect debts while simultaneously requiring other disputes to be resolved in arbitration. And to the extent that small claims court may differ in certain respects from a more traditional state or federal civil court, the small claims carve out actually creates a third type of dispute resolution mechanism.<sup>110</sup> This further undercuts any claim that it is financially impractical for corporations to be subject to more than one dispute resolution system.

Third, many companies include an “opt out” feature that permits a customer to opt out of the arbitration provision if they provide written notice within a specified period of time, typically 30–60 days.<sup>111</sup> Those companies allow customers to maintain their contractual relationship without giving up the right to go to court if the customers choose to exercise that right.<sup>112</sup> This practice also creates dual dispute resolution systems by allowing some consumers to go to court while subjecting others to arbitration.<sup>113</sup>

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108. *See, e.g., id.* § 1.4.6 at 16 (revealing credit card issuers were “significantly more likely” to sue consumers than the other way around).

109. *Id.*

110. *See generally* Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, N.Y. ST. B. J., Dec. 1998, at 6 (providing a detailed description of small claims courts and describing the features which distinguish small claims courts from traditional litigation courts).

111. *Id.* § 2.5.1 at 31.

112. *See, e.g.,* Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 1281 (N.D. Ga. 2008) (quoting Comcast contract with consumer stating that the consumer’s decision to opt out of arbitration “will have no adverse effect” on the continuing contractual relationship with the customer).

113. The cynic would say that the opt-out provision is consistent with the industry’s preference for a single dispute-resolution system because the companies that employ opt-outs do not expect their customers to actually use them. Indeed, the CFPB found that most consumers were unaware that an opt-out right existed, and none of the consumers they surveyed had exercised that right. *See* CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.2, at 11 (“Consumers are generally unaware of any arbitration clause opt-out opportunities they may have been offered by their card issuer.”). Rather, companies include an opt-out provision as a way of fighting unconscionability challenges to their class action bans. With an opt-out, companies can argue the class action ban is not unconscionable, even if it is exculpatory, because consumers can choose whether or not they are subject to the arbitration clause. *See, e.g.,* Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1085 (9th Cir. 2008) (per curiam) (noting that a meaningful opportunity to opt-out of an arbitration clause can be evidence that the clause is not procedurally unconscionable (quoting Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002))). Companies lose little by putting in the opt-out

Fourth, arbitration clauses are not self-executing. While the clause may subject all disputes to arbitration, the parties can choose not to enforce the arbitration provision.<sup>114</sup> If a consumer files a claim in court against a company, the company can choose to litigate in court by not invoking the arbitration clause.<sup>115</sup> If the company declines to invoke the clause, then that claim will stay in court even if other disputes end up in arbitration.<sup>116</sup> In fact, parties will sometimes invoke two different dispute resolution systems in the same proceeding.<sup>117</sup> A fertile source of litigation concerning the enforceability of arbitration agreements is whether a party has waived its right to compel arbitration.<sup>118</sup> Waiver can occur where a party initially defends an action in court, say by filing a motion to dismiss or a motion for summary judgment, or by participating in discovery and then belatedly decides that it would rather send the case to arbitration.<sup>119</sup>

Finally, prior to the Supreme Court's *Concepcion* decision, companies utilized different dispute resolution systems because, at that time, some states enforced class action bans and some states did not.<sup>120</sup> Given the common use of anti-severability provisions, which state that if the class action ban is unenforceable then the entire arbitration clause is unenforceable, a company's arbitration clause would apply in states that

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if few consumers will ever use it.

114. *See, e.g.*, *Eberhard Architects, LLC v. Bogart Architecture, Inc.*, No. 1:14-CV-1185, 2014 WL 4354561, at \*5 (N.D. Ohio 2014) (declaring a party may choose not to invoke an arbitration provision and proceed with litigation).

115. *See, e.g., id.* (allowing the party to avoid arbitration and use the court system if it so chooses).

116. *See Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 9 (1st Cir. 2014) (explaining that a party is free to exclude certain claims from the scope of their arbitration agreement thereby leaving those claims to litigation (first quoting *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 474 (1st Cir. 2011); and then quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989))).

117. *See, e.g.*, *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 728 (8th Cir. 1976) (holding the plaintiff did not waive its right to arbitration because it demanded arbitration and "moved for a stay immediately upon filing the complaint").

118. *See* F. PAUL BLAND, JR. ET AL., *supra* note 4, § 6.7.2.4, at 164 (discussing the doctrine of waiver as applied to arbitration clauses); Frankel, *The Arbitration Clause*, *supra* note 1, at 562 ("Waiver ordinarily results when a party fails to demand arbitration of a dispute, chooses instead to participate in litigation, and later decides that it wants to enforce the arbitration clause.").

119. *See* Frankel, *The Arbitration Clause*, *supra* note 1, at 562 (describing how waiver occurs). For examples involving financial services companies attempting to compel arbitration after first litigating in court, see *Levallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007) (reviewing a financial services company's attempt to compel arbitration after invoking litigation), *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 3 (1st Cir. 2005) (discussing how a party potentially waived its right to arbitration), and *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (concluding waiver of an arbitration agreement should be analyzed the same as any other contractual issue).

120. *See supra* note 46.

enforced class action bans, but not in states that did not enforce them.<sup>121</sup> The arbitration clause that was the subject of the Supreme Court's recent decision in *DIRECTV, Inc. v. Imburgia*<sup>122</sup> provides a good example. DIRECTV's contract with consumers contained a mandatory arbitration provision with a class action ban.<sup>123</sup> The clause further stated that if "the law of your state" renders the class action ban unenforceable, then the whole arbitration clause would be unenforceable.<sup>124</sup> Consequently, DIRECTV was required to use arbitration in states that enforce class action bans but was subject to litigation in states that did not enforce them.<sup>125</sup>

All told, the assertion that financial service companies will abandon arbitration because they cannot manage two different dispute resolution systems seems fanciful and empirically unsupported. Rather, the assertion may simply be an attempt to raise the specter of a slippery slope to discourage the CFPB from prohibiting class action bans. As explained below, I think the industry's second justification fares no better.

*B. Is Individualized Arbitration Financially Infeasible Without a Class Action Ban?*

The industry's other rationale for asserting companies will abandon arbitration if class action bans are prohibited is that individualized arbitration is a money loser for companies.<sup>126</sup> Because companies often pay all or most of the filing fees and for arbitrator expenses, they assert they will lose money on arbitration unless they can counteract those losses with savings from avoiding class actions.<sup>127</sup> This argument is flawed in several respects.

First, the premise of industry's argument is that companies would never choose to use an arbitration clause without a class action ban.<sup>128</sup> However, companies do so all the time. While class action bans are now nearly universal among financial services companies, as the CFPB found, that was

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121. See *supra* notes 87–88 and accompanying text.

122. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

123. *Id.* at 466.

124. *Id.* at 464.

125. *Id.* at 478.

126. See *supra* notes 95–98 and accompanying text.

127. *Id.*

128. See Alan S. Kaplinsky & Mark J. Levin, *CFPB to Consumer Financial Services Companies: Prepare to Wave Goodbye to Class Action Waivers*, BALLARD SPAHR LLP (Oct. 7, 2015), <http://www.ballardspahr.com/alertspublications/legalalerts/2015-10-07-cfpb-to-consumer-financial-services-companies-prepare-to-wave-goodbye.aspx> (“[M]any if not most companies would not include . . . [a class arbitration] option since an industry trade group has characterized class arbitration as ‘a worst-of-all-worlds Frankenstein’s monster.’”).

not always the case. The widespread growth in the use of arbitration clauses began in the 1980s following the Supreme Court's decision that the FAA applied in both federal and state court and it could preempt state law.<sup>129</sup> Yet, class action bans did not come into vogue until the mid-to-late 1990s after industry lawyers devised them as a way of shielding companies from liability.<sup>130</sup> Moreover, plenty of companies still use arbitration clauses that do not include class action bans,<sup>131</sup> and the major arbitration providers have specific rules for interpreting an arbitration clause for purposes of determining whether the clause permits class proceedings.<sup>132</sup> Additionally, some companies have responded to the Supreme Court's endorsement of class action bans in *Concepcion* by adding class action bans to their arbitration

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129. See *Southland Corp. v. Keating*, 465 U.S. 1, 14–17 (1984) (holding section 2 of the FAA applies in state court and that it preempted a provision of state law requiring judicial consideration of certain claims); *Arbitration Agreements*, *supra* note 17, at 32,835 (“From the passage of the FAA through the 1970s, arbitration continued to be used in commercial disputes between companies. Beginning in the 1980s, however, companies began to use arbitration agreements in contracts with consumers, investors, employees, and franchisees that were not negotiated.” (first citing *Soia Mentschikoff*, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850, 858 (1961); and then citing Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, L. & CONTEMP. PROBS., Winter/Spring 2004, at 167, 179)).

130. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0) (describing concerted efforts by financial services companies to promote arbitration and block class actions starting in 1999); see also Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator? Banker's Side*, 7 BUS. L. TODAY 24, 28 (1997) (“Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.”); Bennet S. Koren, *Our Mini Theme: Class Actions*, 7 BUS. L. TODAY 18, 23 (1998) (recommending that companies use class action bans because “[t]he absence of a class remedy ensures that there will be no formal notification and most claims will therefore remain unasserted”).

131. See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013) (addressing a challenge to the arbitrator's decision to allow class proceedings where the arbitration clause did not specifically prohibit them); *Tompkins v. 23andMe, Inc.*, No. 14–16405, 2016 WL 4437615, at \*12 (9th Cir. Aug. 23, 2016) (Watford, J., concurring) (noting that the arbitration clause at issue did not expressly ban class actions). See generally *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (addressing whether class proceedings were permitted where the arbitration clause did not contain a class action ban).

132. See SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, r. 3 (AM. ARBITRATION ASS'N 2003) (“Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the ‘Clause Construction Award’).”); JAMS, JAMS CLASS ACTION PROCEDURE r. 2, at 3–4 (effective May 1, 2009) (“[O]nce appointed, the Arbitrator, following the law applicable to the validity of the arbitration clause as a whole, or the validity of any of its terms, or any court order applicable to the matter, shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class.”).

clauses where they did not previously have them.<sup>133</sup> Even though some of these companies may not be financial services companies, the logic is the same. If they have to pay filing fees and other costs that they would not have to pay in court, then arbitration sans a class action ban should be just as much of a money-loser for them as it is for financial services companies. The fact that they use arbitration clauses that do not necessarily contain a class action ban undercuts the financial industry's assertion that you cannot have one without the other.

Second, it seems unlikely that the small costs associated with paying filing fees and arbitrator costs are enough to turn arbitration from a money-saving form of dispute resolution into a money-losing form of dispute resolution.<sup>134</sup> As mentioned above, industry representatives tout arbitration as a faster, cheaper, and more efficient alternative to court.<sup>135</sup> Initially, in all the years (going back to the 1980s) in which arbitration proponents have been claiming arbitration is faster and cheaper than court, those proponents did not issue (until now) a caveat stating arbitration is faster and cheaper only when a class action ban is involved or that it is cheaper only if the industry does not have to pay the brunt of the initial filing fees. Rather, such proponents have indicated that arbitration is a financially sounder alternative for individual arbitration without qualification. Now that it faces possible regulation, the industry's new eleventh-hour claim, that arbitration is actually not cheaper than court when conducted on an individual basis but that it is only a money saver when it can block class actions, seems suspiciously convenient.

Additionally, the added costs that industry identifies do not appear to be so onerous as to make individual arbitration infeasible. To be sure, there are real costs to conducting arbitration. According to the Consumer Rules of the American Arbitration Association (AAA),<sup>136</sup> consumers must pay a

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133. See Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, AM. CONST. SOC'Y FOR L. & POL'Y, Feb. 2016, at 1, 2 ("In the wake of *Concepcion*, companies across sectors [of the economy] have quietly modified their contracts with employees and consumers to include terms requiring arbitration and banning class actions, blocking access to the courts." (citing Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012))).

134. The CFPB found that consumers paid initial filing fees in 831 disputes, and that "the average and median fees were \$206 and \$125 respectively." CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.3, at 13. The study does not indicate, however, whether businesses paid a share of the filing fee as well.

135. See *supra* notes 27, 89 and accompanying text.

136. The AAA is the dominant arbitration provider used by financial services companies, which is why I discuss its rules here. See CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 2.5.3, at 34–35 (describing AAA's "predominance" in market share among the arbitration clauses examined in its study).

filing fee of \$200 and the business must pay \$1,700.<sup>137</sup> Thus, if the business also agrees to pay the consumer's fee, it is paying a total of \$1,900.<sup>138</sup> The business must also pay for certain arbitrator expenses. For a case resolved solely on written papers (called a "desk arbitration"), the business must pay a flat fee of \$750.<sup>139</sup> The costs rise for telephonic or in-person arbitrations, especially if the arbitration is decided by a panel of three arbitrators rather than by a single arbitrator.<sup>140</sup> However, for cases involving \$25,000 or less, which likely comprise the bulk of consumer claims and are the types of cases most likely to be addressed by class actions, the rules provide that the matter will be resolved by desk arbitration unless the parties agree otherwise.<sup>141</sup> Thus, for most consumer cases, the company will pay around \$2,500 in fees.<sup>142</sup>

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137. CONSUMER ARBITRATION RULES, r. 55 (AM. ARBITRATION ASS'N 2016).

138. *Id.*

139. *Id.*

140. For cases before single arbitrators, business pay an additional hearing fee of \$500 plus \$1,500 per day in arbitrator compensation. For cases before three-arbitrator panels, the filing fee rises to \$2,200, plus a \$500 hearing fee and \$1,500 per arbitrator per day. *Id.*

141. *Id.*

142. In its comments, some industry organizations also assert that they pay some of the consumer's discovery costs in arbitration. *See* Letter from Am. Banker Ass'n et al., *supra* note 98. However, they do not specify how much they pay or how costly discovery is. Most likely, the discovery is much less extensive than that provided in court as one of the reasons that companies like arbitration is that it ordinarily provides for much more limited discovery than litigation, which in turn saves money and makes it harder for a plaintiff to acquire relevant evidence to support his or her claims. *See* SECTION OF DISPUTE RESOLUTION, AM. BAR ASS'N, BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES 6, [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf) (last visited Nov. 13, 2016) ("Unless specifically agreed otherwise by the parties, discovery and related procedures are considerably more limited in arbitration than in litigation."). Of course, discovery in arbitration is not always so limited. *See* Frankel, *Concepcion and Mis-Concepcion*, *supra* note 104, at 249 (recognizing "proceedings under standard arbitration rules are likely to include prehearing motion practice and extensive discovery," and that "[a]rbitration proceedings are now often preceded by extensive discovery, including depositions" (quoting Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 6 (2010))). Discovery in arbitration could get expensive if the parties agree to the same discovery rights as in court, and many parties do provide for expanded discovery rights in arbitration. *See, e.g.*, Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 23 (2010) (noting international arbitration proceedings are increasingly mirroring court proceedings, and that these arbitrations proceedings are "generally perceived as tending to be as expensive as litigation" (quoting QUEEN MARY, UNIV. OF LONDON, ET AL., INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 7 (2006), <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>)). However, expanded discovery is more likely in negotiated business-to-business arbitration agreements than in standard-form non-negotiable business-to-consumer contracts. *See, e.g.*, Lawrence W. Newman, *Agreements to Arbitrate and the Predictability of Procedures*, 113 PENN. ST. L. REV. 1323, 1323 (2009) (finding business arbitration "has become more similar to litigation—particularly U.S.-style litigation in United States courts—in large part because of increased procedural activity, including discovery").

It seems unlikely that the potential profit margins on arbitration are so narrow that \$2,500 would tip the scales from arbitration to litigation. For corporate parties, \$2,500 may represent four to five hours of a single lawyer's time. If arbitration is truly faster than litigation, it is likely more than five hours faster. Likewise, if arbitration discovery is more limited, the discovery savings, which corporate parties describe as astronomical when pushing for discovery reforms in court,<sup>143</sup> would likely be expected to outweigh the filing fees. Similarly, whether the company has a higher relative win rate in arbitration versus litigation is likely to make a bigger difference in determining if arbitration is cost-effective as compared to court than the fact of having to pay filing fees.<sup>144</sup> Indeed, if the relative costs of arbitration and litigation are so close that the filing fee is enough to make arbitration impracticable for companies, that suggests that litigation is not that much, if any, more inefficient or time-consuming than arbitration. There is no small amount of tension between industry's claim that arbitration is faster and cheaper than litigation and that financial services companies cannot afford arbitration if they have to pay the initial filing fee for arbitration.

Third, it is striking that the industry immediately threatened to walk away from arbitration altogether rather than first considering less severe alternatives that would allow them to continue using arbitration. While companies claim that they are losing money because they agree in their contracts to pay the consumers' fees, they are the ones that write those contracts. Nothing is stopping them from re-writing their arbitration

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143. Chamber of Commerce of the United States of America, Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017 at 54 n.154 (Dec. 11, 2013) ("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.").

144. Recent statistics in the employment arena indicate that companies fare better in arbitration than in court. See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 68 (2015) (analyzing consumer arbitrations from the American Arbitration Association from 2009–2013 and concluding that corporate repeat players win at higher rates in arbitration than others and that consumers prevail less often than shown in previous studies). See generally Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014) (finding employees fare worse in arbitration than in litigation). If so, then companies are saving money because they are paying out less in damages, and that savings may be sufficient to offset the extra filing fees. See Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1312 (2015) (contending empirical evidence reveals "employees win less often and win less money in arbitration than in litigation").

agreements to require consumers to pay their own fees and discovery costs.<sup>145</sup> Similarly, if companies find that the American Arbitration Association's fee schedule is so onerous to prevent them from taking part in individual arbitrations, they can use a different arbitration provider, or they can petition for the Association to change its rules. There is no indication that the industry has done so, or has ever told the AAA that its fee schedule for consumer arbitrations is too painful for companies to bear. The fact that they have not done so undermines their assertion that they cannot afford to use arbitration if class action bans are prohibited.<sup>146</sup>

It is not surprising that the industry is much more willing to say that companies will abandon arbitration if the CFPB enacts its proposed rule than it is to give rationales, or support for those rationales for its statements. When examined closely, the industry's arguments lack evidentiary support or persuasive force. That lack of support in turn suggests that the industry's dire predictions will not come true, and that companies will not walk away from arbitration if the CFPB adopts its proposed rule.

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145. Actually, businesses may be disinclined to re-write their arbitration clauses to require consumers to pay their own filing fee because companies want to protect their class action bans at all costs. They do not want to do anything else that would allow a consumer to argue that the arbitration clause is unconscionable because, for example, it imposes such high costs on a consumer that the consumer cannot afford to bring a claim in arbitration. See Richard Frankel, *Bootstraps on the Ground: A Response to Professor Leslie*, 94 TEX. L. REV. 188, 198–99 (2016) (discussing why companies do not want to put in any other terms into their arbitration clauses that would put the class action ban at risk); see also Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 828 (2012) (detailing how companies are including consumer-friendly provisions in their arbitration clauses as a way of protecting their class action bans). And if they keep the class action ban in place, they have nothing to fear from agreeing to pay consumers' costs because they know that almost no consumers will bring an individual arbitration.

146. Businesses that use arbitration clauses know how to lobby arbitration providers to change rules that the businesses do not like. For instance, JAMS, another prominent arbitration provider, announced in November 2004 that it would not administer arbitrations arising out of contracts with class action bans. See Kelly Thompson Cochran & Eric J. Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 793 (2005) ("JAMS attempted to enforce a new policy from November 2004 through March 2005 that purported to invalidate consumer arbitration provisions that preclude class claims."). The defense bar was "furious," and it responded swiftly and forcefully. Philip Allen Lacovara, *Class Action Arbitrations: The Challenge for the Business Community*, CPR INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Mayer Brown), Jan. 11, 2008, at 1, 9, available at [https://www.mayerbrown.com/files/Publication/512c5d76-0ee3-410a-9046-abdd85d3d358/Presentation/PublicationAttachment/bd0f5f12-9295-43f0-95cf-6fc527a98222/NEWSL\\_INTL\\_ARB\\_CPR\\_11JAN08.PDF](https://www.mayerbrown.com/files/Publication/512c5d76-0ee3-410a-9046-abdd85d3d358/Presentation/PublicationAttachment/bd0f5f12-9295-43f0-95cf-6fc527a98222/NEWSL_INTL_ARB_CPR_11JAN08.PDF); Sue Reisinger, *New JAMS Policy Has Angered GCs: Allowing Class Action Claims Barred in Contracts Feeds Fear Others May Also*, NAT'L L.J., Jan. 24, 2015, at 8. As a result, JAMS reversed itself in short order. See Lacovara, *supra*, at 9 (offering JAMS may have "flip-flopped" because of "business pressure"); Nancy J. Moore, *JAMS Reverses Policy on Preclusion Clauses, Citing Court Decisions, Neutrality Concerns*, 6 CLASS ACTION LITIG. REP. 216 (2005) (suggesting JAMS changed its policy after businesses decided to stop using JAMS as an arbitration administrator).

But assuming that the industry's statements are correct, and that arbitration will dry up if class action bans are no longer permitted, that simply reinforces why the CFPB's rule should be adopted rather than rejected.

C. *If Financial Services Companies Abandon Arbitration*

If arbitration as a dispute resolution regime is sustainable only by preventing injured consumers from seeking a remedy from a class action, and only by allowing financial services providers to functionally immunize themselves from almost all liability for their misconduct, then the CFPB's rule becomes even more necessary for protecting consumers. This is because the need for a class action ban to make arbitration viable indicates that the viability of arbitration rests on massive claim suppression. According to the financial services industry, claim suppression by eliminating class actions is the only thing that enables companies to utilize arbitration rather than court for resolving disputes. Essentially, the industry argues that society should accept the loss of class actions in exchange for the benefit of being required to go to arbitration to resolve arbitration disputes.<sup>147</sup>

The only parties that benefit from such a tradeoff are the financial services providers themselves. They give up virtually nothing. Almost no one brings an individual arbitration because either they do not know they have been unlawfully treated, or it is not feasible to bring a claim on an individual basis.<sup>148</sup> As the CFPB found, only 25 consumers per year initiated arbitrations for claims of \$1,000 or less.<sup>149</sup> Even accounting for higher-stakes, the study shows an average of only 411 individual arbitrations a year producing total relief averaging \$300,000.<sup>150</sup>

Consumers, by contrast, give up a lot. The CFPB found that consumer class actions provided an average of \$540 million in total relief per year to millions of consumers.<sup>151</sup> That total is even greater when accounting for deterrence effects and injunctive relief that cause companies to reform their

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147. See Schwartz, *supra* note 9, at 249–50 (explaining how the industry states that consumers should be willing to trade in class actions to resolve disputes in arbitration).

148. See Resnik, *supra* note 68, at 2903–04 (discussing how consumers rarely bring arbitration claims because of a lack of knowledge and resources).

149. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.3, at 11–12.

150. *Id.*

151. *Id.* § 1.4.7, at 16.

business practices.<sup>152</sup> Companies can use their “get out of jail free card,”<sup>153</sup> and consumers are left holding the bag.

The logic underlying the industry’s position further demonstrates that the industry’s goal is claim suppression. By using class action bans, companies effectively make it so that the only way consumers can resolve disputes is by bringing an individual action. But the industry is also saying that individual actions are money-losers for them. The industry’s position is perhaps best encapsulated in the old joke where a retailer states: “We lose money on each sale, but make it up on volume.”<sup>154</sup> If class action bans make arbitration financially feasible for companies, they can do so only by reducing the number of individual claims. Financial services companies know that if class action bans are allowed and enforced, consumers simply will not bring claims in meaningful numbers, and companies can continue their illegal practices virtually unchecked.

Indeed, the financial services industry could not credibly argue that a mass of individual arbitrations would be cheaper than a single, consolidated proceeding. The purpose of a class action is to make proceedings more efficient by resolving related claims in a single action.<sup>155</sup> If thousands of consumers tried to bring individual arbitrations, each with their own filing fees, evidence, discovery, and lawyer’s time, those actions would collectively cost far more than a single consolidated or class proceeding.<sup>156</sup>

Instead, the industry prefers a class action ban even if it makes proceedings much more expensive. That was the essential premise of the corporate position before the Supreme Court in *American Express Co. v. Italian Colors Restaurant*.<sup>157</sup> In that case, it was virtually uncontested that bringing individual antitrust actions could cost a million dollars per action

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152. See Gupta & Khan, *supra* note 133, at 11 (citing CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 40, § 1.4.7, at 16) (discussing the CFPB’s study explaining that consumers’ benefit from class action suits are underestimated); see also Arbitration Agreements, *supra* note 17, at 32,858 (explaining that class action settlements benefit consumers by causing companies to change their practices and identifying several settlements that provided substantial injunctive relief for consumers).

153. *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002).

154. See *We Lose Money on Every Sale, but Make It Up on Volume*, BARRYPOPIK.COM (Feb. 25, 2011), [http://www.barrypopik.com/index.php/new\\_york\\_city/entry/we\\_lose\\_money\\_on\\_every\\_sale\\_but\\_make\\_it\\_up\\_on\\_volume](http://www.barrypopik.com/index.php/new_york_city/entry/we_lose_money_on_every_sale_but_make_it_up_on_volume) (describing the joke and its history).

155. See generally *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613–18 (1997) (providing a description of the characteristics of class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure).

156. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (acknowledging that numerous individual actions would likely cost more than one class action).

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

for cases that were valued in the thousands of dollars.<sup>158</sup> The plaintiff argued that these costs could be spread among plaintiffs if the class action ban was struck down, but American Express and its corporate amici argued—and the Supreme Court agreed—that the class action ban had to be enforced even if it made arbitration prohibitively expensive.<sup>159</sup> That shows that they were not interested in cost-savings or producing the most efficient outcome. They wanted to protect the class action ban at all costs.

Finally, the fact that financial services companies may walk away from arbitration if they are prohibited from using class action bans indicates that they do not like arbitration when they might actually have to use it. Companies like arbitration when it stops consumers from bringing claims in arbitration. But once those barriers are taken away, and companies face the possibility of actually resolving consumer claims in arbitration, they distrust arbitration and do not want to use it. Notably, they distrust arbitration for many of the same reasons that consumers and consumer advocates have used to critique mandatory arbitration clauses. It is striking that companies have said that if they are going to face class proceedings, they would rather face them in court than in arbitration. The United States Chamber of Commerce has described class arbitration as follows: “Class arbitration is a worst-of-all-worlds Frankenstein’s monster: It combines the enormous stakes, formality and expense of litigation that are inimical to bilateral arbitration with exceedingly limited judicial review of the arbitrators’ decisions.”<sup>160</sup> When facing cases with serious stakes, companies do not like the procedural informality and limited appellate and judicial review of arbitration awards. But that formality and limited review are precisely what companies rely on when telling consumers that they should prefer arbitration because it is faster and cheaper than litigation.<sup>161</sup> And, importantly, consumer groups that are critical of the widespread use of mandatory arbitration in consumer contracts complain that arbitration offers fewer procedural protections than litigation and extremely limited

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158. *See id.* at 2308 (acknowledging the cost of bringing individual actions would cost significantly more than the value of the cases).

159. *See id.* at 2316 (discussing how American Express rejected any alternative that would have made arbitration more feasible).

160. Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Plaintiff-Appellants at 2, *Marriott Ownership Resorts, Inc. v. Sterman*, No. 15-10627, 2015 WL 1598605 (11th Cir. Apr. 1, 2015).

161. *See* Am. Bankers Ass’n et al., Comment Letter on Arbitration Study, *supra* note 27, at 3 (“Arbitration is faster, less expensive, and more effective than litigation, including class action litigation, and customers are far more likely to obtain a decision on the merits and more meaningful relief.”).

appellate review.<sup>162</sup> What is good for the goose is good for the gander. If companies are unwilling to swallow arbitration's informalities when facing high-stakes claims, one should be suspicious when those same companies tell consumers that they should send their claims, which to them may carry high-stakes, to arbitration.

## VI. CONCLUSION

As mandatory arbitration clauses have become prevalent in consumer and employment contracts, proponents of arbitration have long praised arbitration as a faster and cheaper alternative to court. Now, it turns out, according to some financial services companies, that these proponents were wrong all along. According to the financial services industry, arbitration, at least on an individual scale, is more expensive for companies than litigation. What has changed in the interim? Not much, except for the CFPB's proposal to prohibit financial services companies from using arbitration clauses that ban class actions. In scrambling to find some way to scuttle the proposed rule, the industry claims that arbitration is financially detrimental to their bottom line. That is, unless arbitration is accompanied by a ban on class actions that allows companies to cheat consumers of hundreds of millions of dollars a year that companies can keep for themselves without being held accountable. The industry's claim that it will abandon arbitration altogether if class action bans are prohibited is logically and empirically dubious. More troublingly, it underscores that the driving force behind arbitration is not to provide consumers with an alternative forum to court, but to deprive consumers of any forum at all.

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162. See *The Arbitration Fairness Act of 2007: Testimony to the Subcomm. on the Constitution of U.S. S. Judiciary Comm. 7–10*, (2007) (testimony of F. Paul Bland, Jr., Staff Attorney for Public Justice). available at <https://www.judiciary.senate.gov/imo/media/doc/Bland%20Testimony%20121207.pdf> (describing that because of unique limitations of arbitration, consumers prefer litigation); Public Citizen, *Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses*, available at [http://www.citizen.org/congress/article\\_redirect.cfm?ID=7332](http://www.citizen.org/congress/article_redirect.cfm?ID=7332) (last visited Feb. 26, 2017).